Kentucky Law Journal

Volume 94 | Issue 3 Article 3

2006

Treading On Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial

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Treading On Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial

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In the aftermath of September 11, 2001, the land underlying the World Trade Center towers has come to be regarded as hallowed ground, unsuitable for private commercial development. How did this happen? The land was deemed consecrated by the deaths of nearly 3,000 people that day, including those who worked in the towers and those who died trying to rescue them. Now considered hallowed, the land has been taken off market and earmarked as memorial ground despite its status as some of the most valuable real estate in the world.

In thinking about this commitment to preserve the World Trade Center towers' footprints in their newly undeveloped state, this Article looks to other sites considered consecrated (or not) through association with human death and burial and their implications for property law and theory.

What I found is that, while basic property law rules, such as adverse possession, dedication, and eminent domain, have been modified and solicitously applied to sites of death and burial associated with whites, this has not been the case with death and burial sites principally associated with non-whites.

In reflecting on this phenomenon, I consider first whether lands associated with death and burial should be given special legal solicitude, concluding that they should in light of the profound personhood interests at stake. In so doing, I build on Margaret Jane Radin's critical insight that property can be importantly constitutive of the self and that the law should give special recognition to such property. I argue that Radin's insight applies at least as profoundly to sites of death and burial as to any other property.

Next, I turn to critical race theory in thinking about the differential treatment of death and burial sites associated with whites and non-whites. I conclude that, while race is not the only reason for the difference in legal treatment, it is nevertheless important. As such, there was nothing surprising about the seemingly indifferent

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and markedly inadequate governmental response to the suffering and deaths of New Orleans' largely African American population in the immediate aftermath of Hurricane Katrina.

I conclude with some thoughts on tragedies "in" the commons, specifically how modification of property law rules to recognize the consecration of land by death and burial can bring human tragedy into the public commons of shared consciousness and experience. The ready inclusion of white death and burial sites into the commons and the hesitant or refused recognition of non-white death and burial sites reveals and reflects the extent to which these lives are differently valued as a matter of both law and culture. In the end, the failure to treat non-whites equally reverentially in death as whites through the lesser legal and cultural solicitude granted sites associated with non-white death is a tragedy visited on our civic commons.

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INTRODUCTION

A. Framing the question of land's consecration (or not) through association with human death and burial

IN the aftermath of September 11, 2001, the land underlying the former World Trade Center towers has come to be considered hallowed ground.[2] How did this happen? The land was deemed consecrated by the deaths of nearly 3,000 people that day, including those who worked in the towers and those who died trying to rescue them. As a consequence, the World Trade Center towers' footprints, i.e., the land immediately underlying the buildings, have been taken off-market, no longer thought appropriate for private ownership, let alone commercial development. Instead, they have been designated as a memorial, and members of Congress have petitioned

2 *See, e.g.*, David Dunlap, *A 20-Ton Cornerstone For Freedom Tower*, N.Y. TIMES, June 20, 2004, at § 1; *see also* David W. Dunlap, *In a Space this Sacred, Every Square Foot Counts*, N.Y. TIMES, April 29, 2004, at B3. Their deaths have also been honored in other formats, including the New York Philharmonic's "On the Transmigration of Souls," composed by John Adams (2001–02). *See* Lawrence Van Gelder, *National Broadcast for Grammy Winner*, N.Y. TIMES, Feb. 15, 2005, at E2.

for national historic landmark status, relying on the land's perceived consecration to preserve it undeveloped in perpetuity.[3]

The extraordinary nature of the widespread agreement not to rebuild on the footprints cannot be overstated given the land's status as some of the most valuable real estate in the world (at least pre–September 11th) and given New York's famously fractious political environment where agreement on anything, especially something as significant in meaning and consequence as this, is rare indeed. In the end, the commitment not to rebuild on the footprints represents a decommodification of once highly prized commercial property[4] and a reinfusion of it into the "commons"[5] for use as a public memorial.

In reflecting on the largely undisputed commitment to preserve the World Trade Center footprints in memory of those who died there, I began thinking about other ways in which property, specifically real property, i.e., land and fixtures on land,[6] has or has not been recognized as consecrated through association with human death and burial,[7] and what consequences

3 *See infra* notes 83–88 and accompanying text.

4 In using the term "decommodification," I reference Margaret Jane Radin's writings on the process by which we, as a legal and social culture, agree that certain "things," such as babies or bodies, should be placed beyond the reach of the market. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (developing her commodification/decommodification argument).

5 *See* Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243–48 (expressing concern for consequences of lack of incentives for maintaining property found in the public "commons").

6 *See, e.g.*, BLACK'S LAW DICTIONARY 564 (2d ed. 1910).

7 There are a number of other significant ways in which land may come to be considered "sacred," humanistically understood (*see* INTRODUCTION, part *B*, *infra*). While beyond the scope of this paper's detailed analysis, two other ways in which land is deemed consecrated are land's embrace by the environmental preservationists and/or conservationists, and land's association with birth, newborns, and the home.

A. The Environmental Movement's Embrace of the "Sacred" Nature of Land

Environmental preservationists and conservationists have been inspired, at least in part, by intimations, or perceived reflections, of the sacred in nature. For some environmentalists, nature is a reflection of the cosmic plan. *See* EMILE DURKHEIM, ELEMENTARY FORMS OF RELIGIOUS LIFE 82 (Karen Fields trans., 2001) ("[T]here is one impression man cannot avoid in the presence of nature.... That sensation of an infinite space that surrounds him, of an infinite time that went before and will follow the present moment, of forces infinitely superior to those at his disposal, cannot fail, it seems, to awaken inside him the idea that there is an infinite power outside him to which he is subject."); *see also* MIRCEA ELIADE, THE SACRED AND THE PROFANE 116 (Willard R. Trask trans., Harcourt, Brace, and Co. 1959) ("[N]ature is never only 'natural'; it is always fraught with a religious value. This is easy to understand, for the cosmos is a divine creation; coming from the hands of the gods, the world is impregnated with sacredness.").

For others, the environment deserves reverence on its own terms, apart from association with cosmic or theistic phenomena, in recognition of its beauty and pristine character. *See, e.g.*, JOHN MUIR: HIS LIFE AND LETTERS AND OTHER WRITINGS (T. Gifford ed., 1996); JOHN MUIR, NATURE WRITINGS: THE STORY OF MY BOYHOOD AND YOUTH, MY FIRST SUMMER IN THE SIERRA, THE MOUNTAINS OF CALIFORNIA, STICKEEN, SELECTED ESSAYS (Library of America 1997); JOHN

MUIR, TRAVELS IN ALASKA (Modern Library 2002); *see also* JERRY MANDER, IN THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS (1991). Still others have written of the transcendental character of the environment. *See, e.g.*, WILLIAM CULLEN BRYANT, *Thanatopsis*, *in* YALE BOOK OF AMERICAN VERSE (Thomas R. Lounsbury ed., 1912).

Legal scholar Carol Rose recently wrote of the environment as a site for contemplation and recognition of the sacred. Referring to nature as *res divini juris*—that which cannot be owned by man because it is sacred—Rose noted:

> I must confess that I once thought there were no real analogs to this kind of property [i.e., temples, tombs, and religious statuary] in the tangible public property of modern secular countries, but I now think I was mistaken. At least in the United States, the great wilderness parks, deserts and seashores, with their sense of the sublime and the vast, may in some ways fill the role of *res divini juris*.

For Rose:

> Such places suggest to the visitor the majesty of creation, the vastness of space, the untamed-ness of something outside human capacity to grasp. If there is a role for *res divini juris* as tangible public property in our modern jurisprudence, surely this is one place where it resides.

Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 109 (2003).

In at least partial recognition of the sacred nature of the environment, Congress has enacted a wide range of environmental protective statutes, including: National Antiquities Act of 1906, 16 U.S.C. § 431 (2000); National Park Service Organic Act of 1916, 16 U.S.C. § 1–4 (2000); Wilderness Act of 1964, 16 U.S.C. § 1131–36 (2000); National Wildlife Refuge Administration Act of 1966, 16 U.S.C. § 668dd–ee. (2000); National Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271–87 (2000); Endangered Species Act of 1973, 16 U.S.C. § 1531–44 (2000); National Forest Management Act of 1976, 16 U.S.C. § 1531–44 (2000); Clean Water Act of 1972, 33 U.S.C. § 1251 (2000); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000); Clean Air Act of 1970, 42 U.S.C. § 7401 (2000); Superfund Amendments and Reauthorization Act, 42 U.S.C. § 9601 (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2000).

B. Recognition of Land's "Consecration" Through Association with Birth, Newborns, and the Home

Recognition of land's consecration through association with birth, newborns, and the home is commonplace among cultures historically, and among indigenous cultures and traditional religious communities today. Examples related to the birthing process include childbirth on the ground, the traditional burial of the placenta, *see, e.g.*, ARNOLD VAN GENNEP, RITES OF PASSAGE 51 (Monika B. Vizedom & Gabrielle L. Caffee trans., Univ. of Chicago Press 1960), and the ritual burial of the umbilical cord. *Id.* In all three examples, the land is deemed consecrated by its association with birth at the same time that the newborn is deemed consecrated by its association with land. As such, a symbiotic relationship is posited between the sacred nature of the newborn and that of the land.

Homes, particularly those in which children were born, have been, and continue to be, considered sacred spaces in many cultures. *See, e.g.*, DURKHEIM, *supra*. As addressed more fully later, Radin asserts the significance of the home in shaping one's sense of self. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). In some cultures, items blessed by the child's first bath are used to consecrate the home. *See, e.g.*, VAN GENNEP, *supra*, at 45–46. In others, crossing over the portal of one's home amounts to passing into sacred space, recognized in the Jewish faith by the placement of the mezuzah on external doorways to the home. Sociologist Van Gennep writes of the importance of the door as a threshold between

that recognition (or not) has had for property law and critical theory. This Article explores the most important of these consequences, revealing the special legal solicitude given many but not all sites of death and burial, and offers a critique of the differential legal treatment accorded such lands by race.

With the exception of Native American burial sites, which have received significant attention in the legal literature, there has been a near total absence of scholarship regarding law's treatment of land associated with death and burial and its implications for critical theory.[8] While there has been much written in the humanities on the significations of burial sites—in the fields of cultural anthropology, history of religion, philosophy, psychology, and sociology—there has been a dearth of attention to these

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the home and the outside, between life and death, ultimately between the sacred and the profane. *Id.* at 20 (declaring "[p]recisely: the door is the boundary between the foreign and domestic worlds in the case of an ordinary dwelling, between the profane and sacred worlds in the case of a temple. Therefore to cross the threshold is to unite oneself with a new world. It is thus an important act in marriage, adoption, ordination, and funeral ceremonies."). Like burial sites, homes receive wide protection, including against vandalism, trespass, and other incursions on privacy.

In a related fashion, mausoleums have been likened to perpetual homes, thereby integrating the grave and the home as sacred spaces. *See, e.g.*, BLANCHE LINDEN-WARD, SILENT CITY ON A HILL: LANDSCAPES OF MEMORY AND BOSTON'S MOUNT AUBURN CEMETERY (1989); DAVID CHARLES SLOANE, THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY (1991). At Mount Auburn Cemetery, burial plots were commonly treated as extensions of the family home and were given similar attention with respect to furnishings, including vases, cast-iron chairs and benches, plantings and other embellishments. Mount Auburn Cemetery's application for National Historic Landmark status at 23–24, http://www.mountauburn.org/national_landmark/history.cfm.

Staying for the moment with the care given burial plots as final homes, the Day of the Dead, observed in Mexico, Brazil, and other Latin American countries, involves the cleansing and adornment of family graves along with preparation of elaborate meals and refreshments to honor the dead. The gravesite as final home receives loving care. *See, e.g.*, Dale Hoyt Palfrey, *The Day of the Dead: Mexico Honors Those Gone But Not Forgotten*, MEXICO CONNECT (1995), *available at* http://www.mexconnect.com/mex_/muertos.html (describing, "[A]t the family burial plot in the local cemetery, relatives spruce up each gravesite. In rural villages this may entail cutting down weeds that have sprouted up during the rainy season, as well as giving tombs a fresh coat of paint after making any needed structural repairs.").

8 One notable exception is Lawrence Friedman's recent article, positing an evolution in concepts of liability and redress, whether grounded in tort, contract, or criminal law, for man-made calamities, looking, *inter alia*, to the 1889 Johnstown flood, the 1927 Mississippi River flood, and the September 11th attacks. Because Friedman focuses on evolving understandings of liability, nowhere does he speak to property law's response to, or regulation of, sites of large-scale loss of life. Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-made Tragedy*, 53 DEPAUL L. REV. 251 (2003).

issues in the legal literature.[9] With this Article and others,[10] I hope to initiate a discussion of the legal doctrinal and theoretical implications of human attachments to land.[11]

B. The "Sacred" Humanistically Understood

In referencing ideas of the "consecrated," "hallowed," and/or "sacred," I do not intend a theistic conception of property's place in a larger religio–cosmic order, but rather seek to draw on a humanistic understanding of the inestimable value of human life.[12] As such, my understanding of "the sacred"

9 Patty Gerstenblith and Sarah Harding come closest in the legal literature to addressing land's potentially sacred character, understood humanistically, not theistically, and I build on their insights here. *See, e.g.*, Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995); Sarah Harding, *Value, Obligation, and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723 (1997).

10 *See, e.g.*, Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critical Race, Feminist, Post-Colonial Critique of the State's Disposition of the Dead*, 58 RUTGERS L. REV. 45 (2006) [hereinafter Clark, *Hands Off*]; *see also* Mary L. Clark, *Reconstructing the World Trade Center: An Argument for the Applicability of Personhood Theory to Commercial Property Ownership and Use*, 109 PENN ST. L. REV. 815 (2005).

11 In addition to death and burial sites, my current research looks to human attachments to sites of birth, the home, environmental preservation, and historic preservation, and examines implications for property law and critical theory.

12 Among those who I draw on for my humanistic understanding of the "sacred" are writers in the transcendentalist tradition, including RALPH WALDO EMERSON, NATURE AND OTHER WRITINGS (New York, Random House 1849); HENRY DAVID THOREAU, WALDEN; OR, LIFE IN THE WOODS (Library of America 1854); and the poet WALT WHITMAN, SONG OF MYSELF (Roycrofters 1855). In Emerson's commencement address at Divinity College circa 1838, for example, he noted:

> For all things proceed out of this same spirit, which is differently named love, justice, temperance, in its different applications.... In so far as he roves from these ends, [a man] bereaves himself of power, of auxiliaries; his being shrinks..., he becomes less and less, a mote, a point, until absolute badness is absolute death.
>
> The perception of this law of laws always awakens in the mind a sentiment which we call the religious sentiment, and which makes our highest happiness....
>
> ...It is the beatitude of man. It makes him illimitable....
>
> ...[A]ll the expressions of this sentiment are sacred and permanent in proportion to their purity. [They] affect us deeper, greatlier, than all other compositions.

Ralph Waldo Emerson, *The Divinity School Address*, *in* 1 THE COLLECTED WORKS OF RALPH WALDO EMERSON 76, 78–80 (1971).

I likewise found William James' writings provocative and engaging. *See, e.g.*, WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 34 (Longmans, Green, and Co. 1920) ("[W]hen in our definition of religion we speak of the individual's relation to 'what he considers the divine,' we must interpret the term 'divine' very broadly, as denoting any object that is godlike, whether it be a concrete deity or not.... What relates to

is reflected in the following definitions offered by the *Oxford English Dictionary*: "4. [r]egarded with or entitled to respect or reverence similar to that which attaches to holy things;" and "5d. [d]evoted to some purpose, not to be lightly intruded upon or handled."[13] In contemplating a non-theistic understanding of the "sacred," I read widely in the literatures of cultural anthropology, history, history of religion, philosophy, psychology, semiotics, and sociology for a greater appreciation of human attachments to land, specifically the human impulse toward reverential space and even more specifically toward reverential treatment of land associated with death and burial.[14] In the end, my reference to the "consecrated," "sacred," or "hallowed" character of land is meant to connote that which relates to the most elevated aspects of human nature and experience.[15]

C. Roadmap of Discussion

This Article proceeds in four parts. Part I highlights the many ways in which legal rules, principally those directly relating to property law, have been modified and solicitously applied in relation to land associated with human death and burial, including principles of adverse possession, dedication, eminent domain, zoning, taxation, desecration, and trespass. Part

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[godlike entities] is the first and last word in the way of truth. Whatever then were most primal and enveloping and deeply true might at this rate be treated as godlike, and a man's religion might thus be identified with his attitude, whatever it might be, towards what he felt to be the primal truth."). See also James' treatment of the importance of Emersonian transcendentalism in JAMES, *supra* at 31–33 ("Modern transcendental idealism, Emersonianism, for instance, also seems to let God evaporate into abstract Ideality. Not a deity *in concreto*, not a superhuman person, but the immanent divinity in things, the essentially spiritual structure of the universe, is the object of the transcendentalist cult.... Such is the Emersonian religion. The universe has a divine soul of order, which soul is moral, being also the soul within the soul of man.").

Additionally, my thinking benefited from reading IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge Univ. Press 1991) (Kant's final work on ethics, from 1797–98), and IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS xv (John Ladd trans., 2d ed. 1999) (*citing* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 53 (Lewis W. Beck trans., 1959) (noting that "[t]he key to Kant's moral and political philosophy is his conception of the dignity of the individual. This dignity gives the individual person an intrinsic worth, a value *sui generis* that is 'above all price and admits of no equivalent.'")).

13 OXFORD ENGLISH DICTIONARY 338–39 (2d ed. 1989).

14 *See generally*, DURKHEIM, *supra* note 7 (arguing, *inter alia*, that religion and law are mutually reinforcing, where earliest religions often had organized society as the object of their reverence).

15 It is interesting in this context to note that, according to Emory historian Cynthia Patterson, the ancient Greeks prohibited burial in or near sacred land, where death and burial sites were not themselves considered sacred or hallowed. *See generally* CYNTHIA PATTERSON, *The Polis and the Corpse: The Regulation of Burial in Democratic Athens*, *in* DEMOKRATIE, RECHT UND SOZIALE KONTROLLE IM KLASSISCHEN ATHEN 93 (David Cohen & Elisabeth Müller-Luckner eds., Schriften des Historischen Kollegs Kolloquien 2002).

II introduces a series of examples of land associated with large-scale loss of life, whether through death or burial, that have been accorded special treatment under the law. In Part III, I contrast the legal solicitude shown land principally associated with the death and burial of whites with the lack of solicitude accorded land associated with the death and burial of non-whites, including slave burial grounds, Native American burial lands, and sites of large-scale loss of non-white life like the Japanese American internment camps.

Lastly, in Part IV, I address implications for critical legal theory of recognizing (or not) the consecrated character of land arising from association with death and burial, building on Margaret Jane Radin's property for personhood theory and offering a critical race theory critique of the differential treatment by race of land associated with death and burial. I conclude with some thoughts on property law's role in bringing tragedies into the commons by promoting public access to and civic consciousness about these sites of large-scale loss.

* * *

A brief word on what this Article is not. First, because it draws on a non-sectarian, non-theistic understanding of the "sacred," the Article largely does not address property consecrated for use by religious entities, such as houses of worship, religious schools, and camps, etc.[16] Second, because the Article focuses on the ways in which land comes to be considered sacred (or not) and their implications for the law of real property, it does not consider the potentially sacred character of personal property, including jewelry, books, photographs, and other mementos. Finally, the Article is not concerned with property in the dead body itself, but rather with interests in land associated with human death and burial.[17]

16 *See, e.g.*, AMERICAN SACRED SPACE 13 (David Chidester & Edward T. Linenthal eds., 1995) ("Clearly, places of worship, such as churches, synagogues, mosques, and temples, have been marked off, ritualized, and interpreted as specific sites of sacred space in America. Often these sites operate as 'nodal points' in a network of sacred places that defines some larger religious landscape.").

17 On the question of human bodies, dead or alive, as property, see National Organ Transplant Act, Pub. L. No. 98–507, 98 Stat. 2339 (1984) (prohibiting sale of human bodies and/or body parts); UNIF. ANATOMICAL GIFT ACT § 2 (1968), 8A U.L.A. 99 (2005) (enabling transfer of organs from one individual, dead or alive, to another); *see also* LORI ANDREWS & DOROTHY NELKIN, THE BODY BAZAAR: THE MARKET FOR HUMAN TISSUE IN THE BIOTECHNOLOGY AGE (2001); Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000). I have also written recently of the government's exertion of control over disposition of dead bodies as a property law issue. *See* Clark, *Hands Off*, *supra* note 10.

I. Examples of Legal Solicitude Granted Certain Parcels of Land Associated with Human Death and Burial

Property doctrine, as reflected in both the common and statutory law, has been modified in a number of critical respects by courts and legislatures in addressing land associated with human death and burial. Some of the ways in which property law principles have been modified include limitations on the availability of adverse possession claims to cemetery lands, recognition of the viability of eminent domain to acquire land deemed significant through association with death, freedom from taxation on burial lands, and the development of historic preservation laws to save sites thought hallowed by association with death.

A. Adverse Possession

As a matter of both American law and English precedent, there can be no adverse possession against dead bodies or cemeteries.[18] Dead bodies are *res nullius*, literally "things belonging to no one,"[19] and thus they can be neither possessed nor adversely possessed. Cemeteries, by contrast, can be owned and possessed (where both the cemetery land and the individual plots can be held in fee simple absolute, i.e., in perpetuity), but cannot be adversely possessed as a matter of law absent evidence of actual and complete abandonment of the site as a burial ground, where the burden of proving abandonment rests with the party seeking to gain title through adverse possession.[20]

18 *See, e.g.*, Jesse Dukeminier & James E. Krier, Property 177 (5th ed. 2002). The other major class of property immune from adverse possession is government-owned property. *Id.*

19 *See generally* Hernandez, *supra* note 17 (providing extensive analysis of property interests in dead bodies). The concept of *res nullius*—that there are things that can be owned by no one (echoed in part in Radin's commodification revulsion argument, *see* Radin, *supra* note 4, at 1855–56, 1855 n.23)—clearly informs the prohibition on payment for human organs codified in the National Organ Transplant Act, Pub. L. No. 98–507, § 101 *et seq.*, 98 Stat. 2339 (1984) (current version at 42 U.S.C. § 273–74 (2000)).

20 *See, e.g.*, N.Y. Gen. Mun. Law § 164 (2005) (authorizing judicial officer to rule on petitions from city councils as to "why the remains of any deceased person buried in potters field, or in any neglected or abandoned cemeteries in which no deceased person shall have been interred within twenty years, should not be removed to and reinterred in a properly kept incorporated cemetery in the same city or in a town or city adjoining the city in which the remains of each deceased person or persons are buried, or in lands owned by said city for cemetery purposes, and to fix the amount of expenses for such removal and reinterment... ."). The statute further provides, "[a]fter said bodies shall have been removed and reinterred in the manner prescribed by said order, said lands in which such deceased persons were originally interred shall be available for and subject to such uses for city purposes as the common council of such city may determine and may be conveyed or otherwise disposed of in the same manner as other city lands." *Id.*

Cemeteries' immunity from adverse possession claims runs counter to the dominant story of adverse possession's development as a doctrine. By authorizing the transfer of title from the original owner to the party putting the property to a more active use, standard adverse possession doctrine creates incentives for owners to use, monitor, and maintain their property so as to defeat adverse possession claims. As such, adverse possession doctrine typically disfavors the non-use of property, authorizing transfer of title to the higher user so as to promote the economic value of the site.

What then informs the rule of no adverse possession against cemeteries? Is it merely a utilitarian recognition that the value of cemetery land for other purposes is low, given the presence of mortal remains, headstones, and other gravemarkers?[21] Or is it in recognition of the sacred nature of the land? Caselaw suggests a combination of the two.

One of the leading cases on point, *A.F. Hutchinson Land Co. v. Whitehead Bros.*,[22] makes clear that both reverence for the dead and pragmatic recognition of the lessened value of cemetery land gave rise to the rule of no adverse possession against burial grounds:

> Every humane instinct urges that the last resting place of the dead should be preserved from profanation, and the desecration of such place should make a strong appeal to the conscience of the court. When, however the land has lost its sacred character, when the remains of those who lie buried in the soil have disintegrated and mingled with the dust beneath, when there is nothing left to identify the ashes that lie buried there, when the names of the dead are no longer heard in the ears of men, and not even a trace of their memory remains, then, it seems to me, no plausible reason suggests itself to the mind why such land should be withheld from serving the needs of a community solely for sentimental reasons.... To perpetually preserve the soil as sacred and hallowed ground, under such circumstances, does honor to neither the living nor the dead.[23]

Thus, in speaking to the reverential element, the *Hutchinson* court was clear that "there can be no actual ouster or adverse possession, to put in operation the statute of limitations, so long as the dead are there buried, their graves are marked, and any acts are done tending to preserve their memory and mark their last resting place."[24] Nevertheless, in speaking to the utilitarian element, the court noted:

21 I wonder, in that regard, whether Plato's law teaching that the dead cannot be buried in agricultural land relates to this utilitarian recognition that the interment of dead bodies negatively impacts the usability and/or marketability of the land. *See* Plato *Laws* 958e (A.E. Taylor trans., 1934).

22 A.F. Hutchinson Land Co. v. Whitehead Bros., 217 N.Y.S. 413 (N.Y. Sup. Ct. 1926), *aff'd*, 219 N.Y.S. 413 (N.Y. App. Div. 1926).

23 *Id.* at 423.

24 *Id.* at 425 (quoting Hines v. State, 149 S.W. 1058, 1060 (Tenn. 1911)).

> Where the ground ceases to be a place of burial or where it has been permanently appropriated to a use or uses entirely inconsistent with its purpose as a cemetery, or where it has been so neglected as to lose its identity as such, it logically follows that under such circumstances title by adverse possession can be acquired.[25]

Likewise, in *Goldstein v. Heirs and Assigns of Cloyd*,[26] the Pennsylvania Court of Common Pleas determined that adverse possession could not be had against an unabandoned cemetery, declaring, "[t]itle to a burial ground may not be obtained by adverse possession so long as the dead are buried there and the graves are marked...."[27] Indeed, the court there refused to limit its protection from adverse possession to the land in which the bodies were buried and graves were marked, but extended it to the whole of the "graveyard or burying ground surrounding the bodies there interred" so as to preserve the integrity of the cemetery, subsequently referring to cemetery land as "God's acre."[28]

B. Dedication

The doctrine of dedication is another example of property law's solicitude toward burial lands. This doctrine enables a private individual to designate part of his or her property for public use as a street, park, burial ground, or otherwise, typically done in exchange for favorable tax treatment of that portion of land.[29] Absent explicit, formal dedication as a cemetery, land may be deemed "dedicated" for use as a burial ground once it has been "set apart and used for cemetery purposes" by members of the public, and therefore receive tax benefits.[30] The Louisiana Court of Appeal in *Thomas v. Mobley*, for example, noted that "regardless of the title to the land itself, when a plot of ground is set apart and used for cemetery purposes, it becomes dedicated to use for such purposes; and that the descendants and

25 *Id.* at 424.

26 Goldstein v. Heirs and Assigns of Cloyd, 26 Pa. D. & C.2d 235 (Pa. Common Pleas Ct., Chester Cty., 1961).

27 *Id.* at 238 (citing St. Peters' Evangelical Lutheran Church v. Kleinfelter, 30 Dauph. 404, *aff'd as modified on other grounds*, 96 Pa. Super. 146 (1929)); *see also* Billings v. Paine, 319 S.W.2d 653, 660 (Mo. 1959) (recognizing that adverse possession may run against unused burial lot).

28 *See Goldstein*, 26 Pa. D. & C.2d at 243.

29 *See* 83 AM. JUR. 2D *Zoning and Planning* § 481 (2005) (noting, "In general, where there is a dedication, the subdivider parts with his interest in the land without formal compensation, but when the dedication is perfected, the subdivider is no longer liable for taxes on the dedicated land and is not obligated to maintain it....").

30 Thomas v. Mobley, 118 So. 2d 476, 478 (La. Ct. App. 1960).

near relatives of those interred therein are entitled to damages for profanation of these sacred grounds" if subsequently disturbed.[31]

Once "dedicated," whether through explicit agreement or actual public use, the portion of land at issue is deemed accessible to the public in perpetuity, with successors in interest to the dedicated land bound by the terms of the designation.[32] As a result, the fee owner loses his or her right of exclusive possession and control and is estopped from subsequently altering the public use to which the dedicated parcel has been put, short of his or her proof of abandonment by the beneficiaries of the dedication.[33]

One of the leading cases on the doctrine of dedication as it relates to cemeteries is, again, *Hutchinson*. There, "the plaintiff charge[d] that a portion of the land conveyed ha[d] been used as a cemetery for over a hundred years; that it was duly dedicated to, and accepted by, the public as a cemetery...."[34] In essence, the plaintiff alleged fraud on the part of the defendant in the sale of land that was not available for commercial development because of its prior dedication as a cemetery. After recounting that "Roman law not only hallowed a cemetery, but regarded a single lawful burial as a dedication of such a site to religious use," the court noted that, "[t]his right, however, might be extinguished by nonuse, and cemeteries were reserved from trade only as long as burials remained."[35] Thus, the same duality of

31 *Id.* (where evidence "reflect[ed] that, commencing in slavery days, a tract of about an acre in extent had been used for burial purposes by the colored families residing on or near the Belleview plantation. The previous landowners as well as the Mobleys had acquiesced in such use, although no formal dedication of the cemetery was ever recorded in the conveyance records.").

For further discussion of the grave desecration cause of action, see Part II.H, *infra*.

32 *See* 23 AM. JUR. 2D *Dedication* § 28 (2005) ("The dedication is ordinarily irrevocable between the vendor and such purchasers."). The doctrine of private dedication of land for public use lost much, though by no means all, of its salience with the rise of zoning in the early twentieth century, which enabled more systematic planning for public uses such as streets, parks, cemeteries, etc. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

33 *See* A.F. Hutchinson Land Co. v. Whitehead Bros., 217 N.Y.S. 413, 419 (N.Y. Sup. Ct. 1926) ("The principle upon which the estoppel rests is, that it would be dishonest, immoral or indecent, and in some instances even sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. The law, therefore, will not permit any one thus to break his own plighted faith....").

34 *Id.* at 415.

35 *Id.* at 417 (citing Clarke v. Keating, 170 N.Y.S. 187, 190 (N.Y. App. Div. 1918)); *see also* Locke v. Lester, 78 So. 2d 14, 16 (La. Ct. App. 1955) (holding that "[a] parcel of land or property dedicated for use by the general public as a cemetery and which continues to serve that public purpose, is classified as a public thing... and as such it is not susceptible of ownership, cannot be alienated and is not subject to prescription," *i.e.*, adverse possession). The *Locke* court cited favorably another court's excerpting at length from a treatise on the law of cadavers as follows:

> Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its char-

reverence and utilitarianism in applying the doctrine of dedication as with adverse possession.

Reflecting on the doctrine of abandonment in the context of dedication, the court observed:

> If no interments have for a long time been made, and cannot be made, therein, and, in addition thereto, the public, and those interested in its use, have failed to keep and preserve it as a resting place for the dead, and have permitted it to be thrown out to the commons, the graves to be worn away, gravestones and monuments to be destroyed, and the graves to lose their identity, and if it has been so treated and used or neglected by the public as to entirely lose its identity as a graveyard, and is no longer known, recognized and respected by the public as a graveyard, then it has been abandoned....[36]

As such, the court gave pragmatic recognition to the need to unburden land of its restriction to burial purposes once that object had been abandoned. After all,

> [i]f every portion of ground which has been made a burial place for man should be devoted in perpetuity for burial uses, the most populous and cultivated districts of the world, where millions upon millions of the human race have sunk into the earth in the countless ages of the past, would have to be abandoned as a dwelling place or means of support to the living inhabitants of the present day.[37]

Instead, "the devotion of land to any particular use must be subject to the changes and vicissitudes which time may bring to it."[38] Thus, as with adverse possession, the dedication can be abandoned, and the land moved to a higher, more commercially profitable use, with the burden of proving abandonment on the party seeking to extinguish the dedication.

As a further example consistent with *Hutchinson*, the New Jersey Superior Court in *Trustees of the First Presbyterian Church v. Alling* recognized that a prior dedication for burial purposes can be extinguished through abandonment, where the land served as "truly a cemetery of by-gone times" and where it would now be "impossible to restore the cemetery."[39]

> acter in the minds and feelings of the community. "It assumes a sacred quality that overrides conveyancers' precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors."

Id. (citing Humphreys v. Bennett Oil Corp., 197 So. 222, 228 (La. 1940)).

36 *A.F. Hutchinson Land Co.*, 217 N.Y.S. at 421.

37 *Id.* at 424.

38 *Id.*

39 Trustees of the First Presbyterian Church v. Alling, 148 A.2d 510, 512–13 (N.J. Super.

In the end, the use of the dedication doctrine to protect cemetery lands, like the prohibition on adverse possession against cemeteries, runs counter to our traditional understanding of property law's emphasis on moving property to its highest and best use, understood economically, where, in creating a restraint on alienability, dedication places a "drag" on value, again understood economically.

C. Partition

By "partition" is meant the power of a tenant in common (i.e., a concurrent interest holder) to sell or mark off as separate a share of jointly held property, thereby converting a co-tenancy into contiguous, or neighboring, independently held lots.[40] The doctrine of partition has been held not to apply to cemetery lots as a further illustration of property law's modification, or adjustment, in the face of association with burial. Thus, for example, in *Goldstein v. the Heirs and Assigns of James Cloyd*, the Pennsylvania court quoted at length from *Brown v. Lutheran Church*:

> Pennsylvania, with a refined and elevated sense of what is due to both the dead and the living, has forbidden, by statute, the opening of streets, lanes, alleys, or public roads through any burial ground or cemetery, and has provided a penalty for wilful [sic] injuries done to grave-yards—not only to the tombstones and fence-railings, but even to the 'shrubs and plants' which bereaved love cultivates in such places.[41]

The *Brown* court continued, "[t]he sentiment is sound, and has the sanction of mankind in all ages, which regards the resting-place of the dead as hallowed ground—not subject to the laws of ordinary property, nor liable to be devoted to common uses."[42] Thus, *Brown* concluded that partition of a burial ground "owned by distinct religious societies as tenants in common" was impermissible as "not within the spirit and meaning of our statutes of partition."[43]

Ct. Ch. Div. 1959).

40 Partition is defined as "the act of dividing; esp., the division of real property held jointly or in common by two or more persons into individually owned interests." BLACK'S LAW DICTIONARY 1151 (8th ed. 2004).

41 *Goldstein*, 26 Pa. D. & C.2d at 241–42 (quoting Brown v. Lutheran Church, 23 Pa. 495, 500 (Pa. 1854)). This passage also highlights potential modification to eminent domain law in the context of burial lands, i.e., that they are not appropriate sites for invocation of the condemnation power for public use.

42 *Brown*, 23 Pa. at 500.

43 *Id.*

D. Eminent Domain

In 1954, the Supreme Court in *Berman v. Parker*[44] recognized "fostering spirituality" as a valid public use for purposes of exercising the eminent domain authority, though spirituality was not itself an element of the public purpose stated in that case. The Court noted:

> [t]he concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[45]

While eminent domain was endorsed in *Berman* for the promotion of spiritual values, and while used in the Gettysburg and Antietam (and other Civil War battlefield) cases for preservation of death and burial sites, condemnations have been struck down where proposed against pre-existing cemetery land.[46] That having been said, eminent domain nevertheless has been used by the federal government to condemn Native American sacred sites, including Native American burial sites.[47]

E. Historic Preservation

As with the use of eminent domain to preserve sites of large-scale loss of life, the historic preservation movement has been shaped, at least in part, by ideas of sacred space associated with the death (and life) of great figures, spawning a wide array of federal protective measures.[48] While cemeteries are not typically understood as eligible for historic preservation under the National Historic Preservation Act,[49] a cemetery may be protected under this rubric if it "derives its primary significance from graves of persons of transcendent importance."[50] Sites of large-scale death and burial, such as

44 Berman v. Parker, 348 U.S. 26 (1954).

45 *Id.* at 33.

46 *See, e.g.*, Memphis State Line R.R. v. Forest Hill Cem. Co., 94 S.W. 69 (Tenn. 1906) (declaring railroad company without right to condemn line through cemetery, even though land had not actually been used for burial purposes); *see also Brown*, 23 Pa. at 500 (suggesting eminent domain not appropriate against burial grounds).

47 *See* Part III.B, *infra*.

48 *See, e.g.*, National Park Service Organic Act of 1916, 16 U.S.C. § 1–4 (2000); National Antiquities Act of 1906, 16 U.S.C. § 431 (2000); Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. § 461–67 (2000); Commission for the Preservation of America's Heritage Abroad of 1985, 16 U.S.C. § 469 (2000); National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2000); Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee–470mm (2000).

49 16 U.S.C. § 470 (2000).

50 36 C.F.R. § 60.4 (2005).

the Alfred P. Murrah Federal Building in Oklahoma City, have been protected under this rubric.[51]

F. Zoning

Much has already been written of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[52] enacted in response to the Supreme Court's partial overturning of the Religious Freedom Restoration Act ("RFRA") in *City of Boerne v. Flores* in 1997.[53] RLUIPA prohibits discriminatory zoning of lands used for religious or religiously affiliated purposes, such as houses of worship, religious schools, religious camps, etc. Per RLUIPA, religious lands, including religious cemeteries, cannot be treated any less favorably than non-religious lands.

Pre-RLUIPA, traditional Euclidian zoning schemes[54] had often relegated cemeteries to the margins of society (both literally and figuratively), alongside heavy industrial sites, highways, dumps, and mental health institutions.[55] The interplay between RLUIPA and Euclidian zoning suggests a degree of ambivalence about the solicitude to be granted cemeteries, at least as it relates to those of a religious nature.

G. Taxation

Most state laws grant cemetery owners broad immunity from tax levies on their burial lands and related fixtures, such as maintenance buildings, where state practices vary as to whether the exemption applies to all cemeteries or only to not-for-profit cemeteries.[56] In a parallel fashion, state law typically exempts individual burial plot owners from property taxes on

51 *See infra* note 87.

52 42 U.S.C. §§ 2000cc–cc5 (2000). Shelley Saxer of Pepperdine has written at length about governmental regulation of land use by churches, both pre- and post-RLUIPA. *See, e.g.*, Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 Mo. L. Rev. 653, 662 (2004) (highlighting RLUIPA-based analysis of eminent domain actions involving religious lands); Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 Ky. L.J. 507 (1995–96) (addressing interaction of zoning laws, nuisance principles, and religious freedom pre-RLUIPA).

53 City of Boerne v. Flores, 521 U.S. 507 (1997) (holding RFRA unconstitutional as applied to states, but not to federal government).

54 *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding comprehensive zoning plan for suburb of Cleveland, Ohio).

55 By direct contrast, historian Cynthia Patterson recounts that burials in ancient Greece were had alongside public roads for all to see. *See* Patterson, *supra* note 15.

56 *See, e.g.*, Mt. Auburn Cemetery v. City of Cambridge, 22 N.E. 66, 69 (Mass. 1889); Olive Cemetery Co. v. City of Philadelphia, 93 Pa. 129, 131 (Pa. 1880); City of Seattle v. Mt. Pleasant Cemetery Co., 109 P. 1052, 1054 (Wash. 1910).

their sites.[57] As for public cemeteries, they are treated as charities for tax deduction purposes under the Internal Revenue Code.[58]

In a related fashion, land placed in conservancy for historic preservation purposes—whether to honor the death (or life) of a great figure (or not)—is also granted favorable tax treatment. This includes lands earmarked by means of conservation easements, where "the value of the conservation easement, usually representing the development value of the land, is deductible as a charitable gift on the federal income tax return."[59]

H. Other Legal Implications

A host of other legal doctrinal consequences flow from recognizing the consecrated nature of land associated with death and burial,[60] including broad judicial oversight of burial sites, with some courts likening this to a trust relationship,[61] and others to the exercise of the police power for public

57 *See, e.g.*, COLO. REV. STAT. ANN. § 7-47-106 (West 1998) (exempting individual burial plots as well as cemetery grounds generally from taxation); GA. CODE ANN. § 48–5–41(2) (2005) (providing exemption from taxation under certain circumstances).

58 *See, e.g.*, Anne Berrill Whalen, Note, *A Grave Injustice: The Uncharitable Federal Tax Treatment of Bequests to Public Cemeteries*, 58 FORDHAM L. REV. 705 (1990); *see also* JESSICA MITFORD, *God's Little Million Dollar Acre*, *in* THE AMERICAN WAY OF DEATH REVISITED 81–82 (1998).

> Prevailing sentiment that there was something special and sacred about cemetery land, that it deserved special consideration and should not be subjected to such temporal regulation as taxation, was reflected in court decisions and state laws.... Other rulings have affirmed that land acquired for cemetery purposes becomes entirely exempt from real estate taxes the moment it is acquired, even before a dead body is buried in it.... Cemetery land is tax-free, which is as it should be, since in theory the land is not to be put to gainful use. Cheap land which for one reason or another does not easily lend itself to such needs of the living as housing and agriculture is commonly used for cemeteries.... The winning combination that has transformed the modern cemetery into a wildly profitable commercial venture is precisely its tax-free status, the adaptability of cheap land to its purposes, the almost unlimited possibilities of subdividing the land....

Id. at 82.

59 DUKEMINIER AND KRIER, *supra* note 18, at 858 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6, cmt & stat. note (2000)).

60 As with our reference to Euclidian zoning above, not all property rules are solicitous of cemetery lands. Certain rules, such as nuisance regulation, remain unmodified in the face of burial lands. Thus, cemeteries, like other properties, are subject to nuisance law's balancing of the social utilities of competing land uses. *See, e.g.*, Harris v. Borough of Fair Haven, 721 A.2d 758, 761 (N.J. Super. Ct. Ch. Div. 1998).

61 *See, e.g.*, Trustees of the First Presbyterian Church v. Alling, 148 A.2d 510, 513 (N.J. Super. Ct. Ch. Div. 1959) (declaring, "A burying ground or cemetery is affected with a public interest and is a trust.").

health and welfare;[62] permitting and reporting requirements for excavation or other disturbances of historical or cultural resources on public and private lands;[63] laws regulating archaeological excavations of burial sites specifically;[64] tort and criminal laws regarding trespass against cemeteries and other burial sites;[65] and tort and criminal law prohibitions on desecration of graves and headstones,[66] where the desecration of national cemeteries constitutes a federal crime.[67]

62 *See, e.g., In re* Hunlock's Creek Cemetery, 16 Pa. D & C. 152, 153 (Ct. of Quarter Sess'ns, Luzerne Cty. 1930).

63 *See, e.g.,* NAGPRA, *infra* note 119; *see also* Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine after* Lucas, 13 ST. THOMAS L. REV. 65, 102–06 (2000).

64 For laws regulating archaeological excavations, see Zahra S. Karinshak, Comment, *Relics of the Past—To Whom Do They Belong? The Effect of an Archaeological Excavation on Property Rights*, 46 EMORY L.J. 867 (1997). *See also* Part III.B for discussion of federal and state laws specific to Native American historic sites.

65 On the tort law prohibition on trespass against gravesites, see, e.g., Smith & Gaston Funeral Directors, Inc. v. Dean, 80 So. 2d 227, 230, 233 (Ala. 1955).

66 On the common law tort prohibition on desecration of graves and headstones, see, e.g., Locke v. Lester, 78 So. 2d 14, 16 (La. Ct. App. 1955) (noting that courts have generally understood that cemeteries are "regarded by the community as sacred soil, and a cause of action is allowed a litigant when the graves of his family in such a public cemetery are disturbed or desecrated"); *see also* Chew v. First Presbyterian Church, 237 F. 219, 241 (D. Del. 1916) (holding that a surviving family can seek an injunction against desecration). On the criminal prohibition of desecration of graves and headstones, *see, e.g.,* N.C. GEN. STAT. § 14-149 (2005) (declaring vandalism and desecration of graves Class I felonies); Oatka Cemetery Assoc. v. Cazeau, 275 N.Y.S. 355 (N.Y. App. Div. 1934); Conn v. Boylan, 224 N.Y.S.2d 823 (N.Y. Sup. Ct. 1962); *see also* PATTY GERSTENBLITH, *Cultural Significance and the Kennewick Skeleton, in* CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 187 n. 39 (Elazar Barkan & Ronald Bush eds., 2002).

Sociologist Arnold Van Gennep's work anticipates these prohibitions on trespass and desecration when he asserts that the separation of the sacred from the profane, both figuratively represented and actually maintained by the erecting of barriers around burial sites, provides the outer boundaries to socially acceptable behavior. A sacrilege occurs when a profane person enters sacred territory, or when a profanation is committed against sacred space. Such profanations are proscribed by the civil and criminal laws of desecration and trespass. VAN GENNEP, *supra* note 7, at 15–16.

67 Vandalization of U.S. national cemeteries first became a federal crime during the Civil War. Today, desecration of national cemeteries, federal monuments and memorials, and/or national historic preservation sites gives rise to federal criminal liability, with penalties stipulated in the U.S. Sentencing Guidelines. *See, e.g.,* Press Release, U.S. Sentencing Commission, Sentencing Commission Increases Penalties for Crimes Against Cultural Heritage (March 29, 2002), *available at* http://www.nathpo.org/News/News-Legal_Issues5.html.

II. Examples of Death and Burial Sites Accorded Broad Solicitude under Property and Related Laws

Our consideration of sites accorded wide solicitude under property and related laws begins with burial sites traditionally understood, then moves to sites of large-scale loss of life, and, finally, to memorial sites.

A. Evolving Legal Status of Cemeteries Generally

Ancient Greece and Rome differed markedly in their characterization of burial sites, where Athens did not treat burial grounds as sacred land,[68] while Rome did. With regard to the latter, legal scholar Charles Reid recounts the evolving pre-Christian and Christian-era legal regulation of cemeteries as follows, "[a] decree of the pre–Christian, second–century Roman emperor Antoninus Pius announced that burial places were 'religious places' (*religiosa sacra*). A subsequent decree of the third-century emperor Philip the Arab ruled that burial grounds, being religious places, could not be bought or sold as articles of commerce,"[69] an early precedent for the decommodification of death and burial sites, as with the adverse possession doctrine's immunization of cemetery lands generally and the World Trade Center footprints' removal from commerce specifically. As for the evolving Christian law regulation of burial lands, Reid notes, "[t]he Christian emperors only strengthened [the Roman emperors' prior] commitments," with Justinian's Institutes emphasizing that "religious ground, such as a cemetery, was subject to divine law and could not really be considered anyone's private property."[70] Again, burial sites, like dead bodies, were considered *res nullius*—a thing owned by no one.

American law builds on these Judeo-Christian understandings of the sacred nature of burial sites through many of the modifications made to property law principles highlighted in Part I above. Indeed, state and federal courts have drawn widely on the Judeo-Christian tradition in resolving legal questions related to cemetery lands. For example, one New Jersey court declared:

> The place where the dead are buried is regarded generally, if not universally, as hallowed ground. We express our love for our dead by placing their bodies in the earth tenderly and sorrowfully, ... we give expression to

68 *See supra* note 14.

69 Charles J. Reid, *The Body of the Human Person in American Law: Sacred Receptacle of the Holy Spirit or Marketable Commodity?*, *in* Figures in the Carpet: Finding the Human Person in the American Past 5–6 (Wilfred McClay ed. forthcoming).

70 *Id.* (explaining that in Christian theology, the term "cemetery," which "had meant 'sleeping place,' or 'dormitory'" to pre-Christian Greeks ("koimeterion") "came to be used to describe the resting places of Christians who had fallen asleep and await the coming of the Lord.").

> our veneration for their dust by adorning and beautifying the spot where it reposes. Their dust is sacred to us.[71]

"Our reverence," the court continued, "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."[72] Likewise, a Maryland court declared, "[t]hrough the ages, all civilized peoples have considered the final resting place of their dead as hallowed and sacred ground."[73] A Minnesota court, quoting at length from the treatise, *American Jurisprudence on Cemeteries*, observed, "[t]he sentiment of all civilized peoples regards the resting place of the dead as hallowed ground, and requires that in some respect it be not treated as subject to the laws of ordinary property.'"[74] We shall see in Part III, however, that this solicitude toward cemetery land does not extend to sites of death and burial principally associated with non-whites.

B. Gettysburg National Battlefield and Cemetery

Any reference to the consecration of land by association with death and burial necessarily evokes Lincoln's address in dedicating the Soldiers' National Cemetery at Gettysburg, Pennsylvania. Deeming the Gettysburg battlefield hallowed by those who fell there,[75] Lincoln declared:

> We are met on a great battlefield of that war. We have come to dedicate a portion of it as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.
>
> But, in a larger sense, we can not dedicate—we can not consecrate—we can not hallow this ground. The brave men, living and dead, who struggled, here, have consecrated it far above our power to add or detract.[76]

71 Moore's Ex'r v. Moore, 25 A. 403, 405 (N.J. Ch. 1892).

72 *Id.*

73 Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church, 399 A.2d 936, 940 (Md. Ct. Spec. App. 1979) (quoting Diffendall v. Diffendall, 209 A.2d 914, 916 (Md. 1965)).

74 State v. Lorentz, 22 N.W.2d 313, 315 (Minn. 1946) (quoting 10 AM. JUR. *Cemeteries* § 22), *cited in* Reid, *supra* note 69, at 56.

75 African-American soldiers' mortal remains were segregated from those of whites in national cemeteries from the time of their founding in the Civil War era through World War II. It was only with Truman's 1948 Executive Order 9981 to integrate the armed forces that white and non-white soldiers were buried proximate to one another. *See, e.g.*, Arlington National Cemetary, http://www.arlingtoncemetery.org/historical_information/black_history.html (last visited Oct. 22, 2005) (regarding burial practices for white and non-white soldiers).

76 *Quoted in* GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 263 (1992).

More than thirty years after the battlefield's dedication as a cemetery, the federal government exercised its eminent domain authority to condemn the land at issue, then owned by the Gettysburg Electric Railway Company.[77] The *Gettysburg Electric Railway Co.* case was the first exercise of eminent domain authority for historic preservation purposes to reach the Supreme Court, in 1896. There, the Court upheld the validity of the federal government's stated public purpose to honor the fallen Union soldiers,[78] avowing, "their graves shall not remain unknown or unhonored."[79] The government's acquisition of the battlefield thus rested at least in part on the land's perceived hallowed nature.[80]

The impulse toward preservation of hallowed ground embodied in the Gettysburg battlefield case is likewise seen in the legal status and treatment of other Civil War sites. The two most prominent examples here are the founding of Arlington National Cemetery[81] and preservation of Antietam National Battlefield and Cemetery through exercise of the government's eminent domain power against Robert E. Lee 's family estate, in the first

77 U.S. v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 681 (1896).

78 Pursuant to the Fifth Amendment of the U.S. Constitution, the federal government must articulate a public use justifying exercise of eminent domain authority. *See* U.S. CONST. amend. V.

79 *Gettysburg Elec. Ry. Co.*, 160 U.S. at 683.

80 EDWARD TABOR LINENTHAL, SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS 3–4 (1991) (noting, "Like visitors to the sacred natural sites of the nation, visitors to battlefields often use religious language to express their awe, having stood on ground sanctified by the 'blood of our fathers.' In 1886 J. Howard Wert remarked in his guidebook to the Gettysburg battlefield that 'those who have traversed with us these rock-crowned cliffs have gone over the most consecrated ground this world contains, except the path of the Savior of the world as he ascended the rugged heights of Calvary.'"); *see generally* JAMES MCPHERSON, HALLOWED GROUND: A WALK AT GETTYSBURG (2003).

81 Arlington National Cemetery was established immediately post–Civil War in response to a joint resolution of the House and Senate. The U.S. Congress exercised its eminent domain power in siting the cemetery on the grounds of Robert E. Lee's family estate, where Lee had been the Confederate Army's chief commanding officer during the Civil War. While the federal government disputed its Fifth Amendment obligation to pay just compensation to the Lee estate, the Supreme Court determined that such compensation was indeed due. *See* United States v. Lee, 106 U.S. 196, 220 (1882) (holding federal government obligated to pay just compensation per Fifth Amendment to heirs of General Lee following condemnation of their land to create Arlington National Cemetery).

Arlington's Civil War–era interments have, of course, been supplemented by those of U.S. veterans felled in subsequent armed conflicts, as well as by non-military officials, including presidents and chief justices. Today, plaques throughout the site proclaim the cemetery's status as hallowed ground, specifically, as the "nation's most sacred shrine":

> Welcome to Arlington National Cemetery, Our Nation's *Most Sacred Shrine.*
> Please conduct yourselves with dignity and respect at all times.
> Please remember these are hallowed grounds.

Arlington National Cemetery, http://www.arlingtoncemetery.net (last visited, May 3, 2006) (emphasis added).

example, and individual farmers, in the second.[82] The use of the condemnation power, and, later, national historic landmark preservation laws, to save these sites shows the extent to which property law can and has been used to create or recognize reverential space associated with human death and burial.

C. The World Trade Center Footprints

In a story declaring in bold lettering, "TWENTY–FOUR TONS OF ADIRONDACK STONE WILL BE SET INTO *HALLOWED GROUND* ON JULY 4,"[83] the *New York Times* underscored the perceived consecrated status of the land at the World Trade Center site following the large-scale loss of life on September 11, 2001. Continuing, "the sanctity and rawness of that ground, where the incision of a ceremonial spade would have been regarded by some as the reopening of an awful wound or the desecration of a cemetery, compelled state officials to devise another kind of ceremony,"[84] the news story's likening of the building's footprints to a cemetery is apt where nearly 3000 people perished there that day, their remains, if any, mixing with the buildings' ashes.

The widespread commitment to hallow the World Trade Center footprints by decommodifying them, i.e., by taking them off the commercial,

82 The September 17, 1862, battle at Antietam, Maryland, remains the bloodiest day elapsed on American soil, with more than 23,000 soldiers killed, wounded, or missing. *See* JAMES M. MCPHERSON, CROSSROADS OF FREEDOM: ANTIETAM 3 (2002). As with Gettysburg and Arlington, the federal government exercised its eminent domain authority to gain title to the Antietam battlefield and cemetery from the state of Maryland in the 1880s, as the state had in turn condemned the property from a private farmer after the war.

As with the Arlington cemetery, plaques displayed throughout the Antietam cemetery proclaim the site's consecration by the valor and death of those interred. Quoting Theodore O'Hara's Mexican-American War–inspired poem, "The Bivouac of the Dead," the plaques at Antietam exhort:

> Rest on embalmed and sainted dead!
> Dear as the blood ye gave;
> No impious footstep here shall tread
> The herbage of your grave;...
> For honor points the hallowed spot
> Where valor proudly sleeps.

THEODORE O'HARA, THE BIVOUAC OF THE DEAD (1847) (composed in honor of Kentucky troops killed in the Mexican-American War). Burial & Memorial Benefits, Theodore O'Hara's "Bivouac of the Dead," http://www.cem.va.gov/bivouac.htm (last visited Sept. 11, 2005).

83 David W. Dunlap, *From Granite Block, Freedom Tower Will Rise*, N.Y. TIMES, June 20, 2004, at 1 (emphasis added).

84 *Id.* In echoing this widely held sentiment, former New York City mayor, Rudy Giuliani, declared, "I am convinced that Ground Zero must first and foremost be a memorial. All other decisions should flow from that goal." Rudy Giuliani, *Getting It Right at Ground Zero*, TIME, Sept. 9, 2002, at 67.

or other, real estate market includes a proposal to confer National Historic Landmark status on them, as noted above.[85] Introduced by Representatives Carolyn Maloney of Long Island and Chris Shays of Connecticut, the proposal is explicitly premised on the land's significance as a burial site, or final resting place, for those killed on September 11th. The findings upon which the proposed landmark status lie emphasize the grave-like nature of the site. Findings 9 and 10, for example, provide:

> (9) A broad and deep consensus has emerged in the United States that the former World Trade Center site, and particularly the tower footprints, bear a uniquely tragic and transcendent significance in our Nation's history due to the unparalleled events that took place there; the almost unfathomable number of innocent lives lost; ... and the fact that the circumstances of their death has meant there is almost no physical trace of most of the victims.
>
> (10) The bedrock footprints of the former World Trade Center towers are in the area of the site where the greatest number of victims lost their lives and where the majority of human remains were found, and therefore represent the final resting place of a majority of the victims.[86]

As such, the proposal assumes the land's consecrated nature as widely accepted fact.[87] While the proposal lingered in the House and died without a

85 H.R. 3471, 108th Cong. (2003). ("A bill to authorize the Secretary of the Interior to conduct a special resource study of the area at or near the footprints of the former World Trade Center towers for possible inclusion in the National Park System to commemorate the tragic events of September 11, 2001.")

The Coalition of 9/11 Families played a critical role in pressing for the preservation of the footprints in undeveloped form. As recently reported in the *New York Times*:

> The remnants are subject to protection under the National Historic Preservation Act because the transportation hub is largely financed by the Federal Transit Administration. The Port Authority has agreed to preserve in place "to the maximum extent feasible" the 84 column remnants of the north tower and the 39 remnants of the south tower. However, as many as eight column remnants could be temporarily or permanently removed to accommodate a fourth PATH train platform.

David Dunlap, *After Day of Mourning, New PATH Terminal Begins to Sprout*, N.Y. TIMES, Sept. 13, 2005, at A27.

86 *See* H.R. 3471, 108th Cong. (2003).

87 As with the World Trade Center footprints, the site of the Alfred P. Murrah Federal Building in Oklahoma City was regarded as consecrated by the deaths of 168 people, including 19 children in the April 19, 1995 bombing attack. *See, e.g.*, John Kifner, *In Oklahoma, a Week of Remembrance*, N.Y. TIMES, Apr. 18, 2005, at A14 (noting that land on which the Murrah Building once stood is called "sacred ground" and that Oklahoma City National Memorial has "become a place of pilgrimage"). More expansive than the World Trade Center footprints, the Oklahoma City memorial encompasses the entirety of the bombing site and proclaims to "honor[] the victims, survivors, rescuers, and all who were changed forever on April 19, 1995." The National Park Service, Oklahoma City National Memorial, http://www.nps.gov/okci/home.htm (last visited Sept. 10, 2005).

Because the Oklahoma City bombing site was already public land, there was no need

vote, other modifications to the sites' status were negotiated to allow for the preservation of undeveloped, reverential space.[88] Thus, the World Trade Center site has been widely embraced as having been transformed from a site of the profane ("world trade") to that of the sacred through the large-scale loss of life suffered there.

D. Other memorial sites

Numerous memorial sites reflect this impulse toward marking sites consecrated by human death and burial, such as the Johnstown Flood National Memorial or the Pearl Harbor Memorial, while other memorials do not rep-

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for federal authorities to exercise eminent domain, nor negotiate with private parties (as at issue in the World Trade Center site), to gain control of the site for purposes of erecting a national memorial. Rather, the federal government was free to demolish what was left of the Murrah building, which it did, and to erect a memorial and museum in its place. THE CITY OF OKLAHOMA CITY, ALFRED P. MURRAH FEDERAL BUILDING BOMBING: FINAL REPORT (1996).

As with the World Trade Center footprints, legislation was introduced in Congress seeking to confer national historic landmark status on the Oklahoma City bombing site. But, unlike the legislation at issue in the World Trade Center site, the Oklahoma City National Memorial Act of 1997 was enacted, thereby transferring control of the site in perpetuity to the National Park Service. Oklahoma City National Memorial Act of 1997, Pub. L. No. 105–58, 111 Stat. 1261 (1997) ("An Act to establish the Oklahoma City National Memorial as a unit of the National Park System; to designate the Oklahoma City Memorial Trust, and for other purposes."). In signing the Oklahoma City National Memorial Act, President Clinton declared:

> I am pleased to sign today S. 871, the "Oklahoma City National Memorial Act of 1997" ....
>
> The significance of the tragedy of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and the meaning and implications of this event for our Nation, compel the establishment of this memorial as a visible and prominent national shrine.

The White House: Office of the Press Secretary, Statement by the President (Oct. 9, 1997), http://clinton6.nara.gov/1997/10/1997-10-09-president-on-oklahoma-city-national–memorial-act.html.

By contrast with the Oklahoma City bombing site, other sites recently recognized with National Historic Landmark designations, including New York City's African Burial Grounds and the World War II Japanese-American internment camps, have not been so quickly or unanimously embraced. I discuss these sites' treatment in Part III, *infra*.

88 Most recently, Governor Pataki stepped in to veto the construction of the agreed-upon International Freedom Center at Ground Zero, where there had been an increasingly fractious debate over whether the Center would be critical of the United States in charting the background to 9/11, and whether there should be any structures on the memorial site beyond the memorial itself. A subset of the 9/11 victims' families were actively opposed to any critical references to the United States and, ultimately, to the Center altogether. Their interests prevailed in Pataki's veto, prompting high-level resignations from the memorial's fund-raising board, including that of Agnes Gund. *See, e.g.*, Robin Pogrebin, *Is Culture Gone at Ground Zero?*, N.Y. TIMES, Sept. 30, 2005, at E33; David Dunlap, *Focus Shifts to Retail Plans at Ground Zero*, N.Y. TIMES, Sept. 30, 2005, at B1.

resent the actual sites of loss, but, rather, constitute the reverential space created for memorialization, most prominently among them, the Vietnam Veterans Memorial.

1. Johnstown Flood National Memorial.—Dedicated in 1964, the Johnstown Flood National Memorial commemorates the 2200 individuals killed by the 1889 flood prompted by the bursting of the Conemaugh Lake dam.[89] While framed as a struggle of rich against poor, where the flood imperiled the 30,000 residents of Johnstown, a working-class city, and occurred because of a rupture in a dam used to form a recreational lake for Andrew Carnegie, Paul Mellon, and others,[90] it is also the site of nearly exclusively white loss. In 1964, the federal government established the Johnstown Flood National Memorial, *inter alia*, to honor those who died and to commemorate the most damaging flood in the nineteenth-century United States.[91]

2. Pearl Harbor Memorial.—Dedicated in 1962, the U.S.S. *Arizona* Memorial commemorates the Japanese attack on Pearl Harbor of December 7, 1941, in which 2388 individuals died, of those all but 48 members of the U.S. military. The sunken remains of the U.S.S. *Arizona*, on which 1177 crew died in the attack, were commemorated in 1962 with the dedication of the floating memorial that exists today.[92] Its delayed commemoration is attributable, not to any ambivalence about memorializing this site of death, but, rather, by preoccupation with the intervening Korean conflict.[93]

3. Vietnam Veterans Memorial.—By contrast with the Pearl Harbor Memorial, the Vietnam Veterans Memorial,[94] dedicated in 1982, did not have clear public support at the outset, where the divisive nature of the war, our humiliation in loss, the controversial selection of Maya Lin, an Asian -American architecture student, to design the memorial, and the memorial design's somber use of trench and/or grave imagery made for a hotly contested project.[95] Now the single most-visited monument in the United

89 *See generally* DAVID MCCULLOUGH, THE JOHNSTOWN FLOOD (1987).

90 *Id.*

91 National Park Service Cultural Resources, http://www.cr.nps.gov (last visited May 3, 2006).

92 National Park Service, USS Arizona Memorial, http://www.nps.gov/usar/ (last visited May 8, 2006).

93 *See* AMERICAN SACRED SPACE, *supra* note 16, at 3–4 .

94 Vietnam Veterans Memorial: Legacy, http://www.nps.gov/vive/legacy/legacy.htm (last visited May 6, 2006).

95 As with the Vietnam memorial at its inception, the commemoration of the Vietnam War–era slayings of four Kent State students by the Ohio National Guard was a highly contested matter, where some labeled "unpatriotic" the memorialization of the dead student war protestors. *See* Kent State University, May 4, 1970, http://www.kent.edu/History/may4_1970/index.cfm (noting "Kent State's learning community has honored the memories of Allison

States, the Vietnam Memorial serves as a natural segue to Part III, *infra*, in which I consider a range of examples of land associated with death and burial that have not received special legal solicitude.

The Vietnam Veterans Memorial functions in many ways like a traditional cemetery, with visitors searching for a particular loved one's name, often directed to the site by an official guide, and thereafter making offerings to the individual dead, where its iconography is at odds with many war memorials, such as the Korean War memorial or Arlington's Tomb of the Unknowns, where there is little to no tribute paid to the individual. That the memorial was initially so hotly contested and now so widely visited is striking indeed in the context of my conclusion that property law's solicitous treatment of death and burial sites is a mechanism by which those losses are brought into the commons of public experience and civic consciousness.

III. Examples of Failed or Conflicted Legal Recognition of Sites Associated with Non-White Death and Burial

I turn now to those sites of death and burial that have not, or only hotly contestedly, been granted legal solicitude. While by no means an empirical, or exhaustive, study, the contrast in treatment between the sites that follow and those cited above suggests a strong correlation between the degree of legal solicitude accorded a site and the site's association with white or non-white death or burial.[96]

Krause, Jeffrey Miller, Sandra Scheuer and William Schroeder with an enduring dedication to scholarship that seeks to prevent violence and promote democratic values from public service to civil discourse.... A university committee, established in 1984, recommended that a permanent memorial be built and indicated 'the site should present the visitor with the opportunity to inquire into the many reasons and purposes of the events that led to the killing and wounding of students on May 4, 1970, and to encourage a learning process to broaden the perspective of these events.' A national design competition was initiated in 1985, and the design of Chicago architect Bruno Ast was selected for the memorial. The memorial was dedicated on May 4, 1990.... In 1999, permanent markers were placed in the Prentice Hall parking lot to designate where the students fell.").

96 When seen in this light, there was nothing surprising about the various governments' failure to respond more urgently to the destitution caused by Hurricane Katrina and the levee failures in New Orleans, a largely African-American city (69% as of September 2005), especially where those left behind in the hurricane's wake were disproportionately African-American. *See, e.g.*, Chart, *The Neighborhoods that were Hit Hard and Those That Weren't*, N.Y. Times, Sept. 12, 2005, at A13 (providing neighborhood by neighborhood statistical analysis of racial composition of those hit hardest by Hurricane Katrina's aftermath); *see also* Jodi Wilgoren, *Storm and Crisis: The Economic Divide; In Tale of Two Families, a Chasm Between Haves and Have-Nots*, N.Y. Times, Sept. 5, 2005, at A1; John M. Broder, *Storm and Crisis: Racial Tension; Amid Criticism of Federal Efforts, Charges of Racism Are Lodged*, N.Y. Times, Sept. 5, 2005, at A9.

In this same light, the failure to decommodify the site of the Triangle Shirt Waist factory

A. Law's Treatment of Slave Burial Grounds and other Long-Standing African-American Burial Grounds

In contrast with law's solicitous treatment of cemeteries generally, *see* Part IIA above, the history of legal treatment of slave and other long-standing African-American burial grounds has been one of neglect or outright disregard.[97] 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.[98]

In 1991 excavations for a new federal building in Lower Manhattan exposed the remnants of a seventeenth-century African burial ground, with

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fire, where 141 individuals died, could be seen as a product of similar differential treatment by race and/or ethnicity, where the principally eastern and southern European immigrant women who worked in the factory, a substantial number of whom were Jewish, were not considered white at that time. Nevertheless, while the site of the fire was not taken off-market as a form of commemoration, the fire was memorialized through the enactment of workplace-safety legislation in New York and elsewhere, as my colleague Mark Niles argues. *See also* DAVID VON DREHLE, TRIANGLE: THE FIRE THAT CHANGED AMERICA (Atlantic Monthly Press 2003); NEW YORK, A DOCUMENTARY FILM, EPISODE FOUR, THE POWER AND THE PEOPLE, 1898-1918 (Steeplechase Films, WGBH Boston, Thirteen WNET, and New York Historical Society 1999).

97 *But see* Female Union Band Assoc. v. Unknown Heirs at Law, 403 F. Supp. 540 (D.D.C. 1975), *aff'd*, 564 F.2d 600 (D.C. Cir. 1977) (reversing order to disinter bodies and sell slave cemetery where cemetery had been restored to compliance with health codes and cemetery had been named a historical landmark); Bostwick v. New Hope Baptist Church, 111 So. 2d 201 (La. Ct. App. 1959) (modifying order to exclude portion of land awarded to plaintiff where land was used as "burial ground for colored people of the community").

98 When I undertook this project, I was interested to learn whether class status had as strong a correlation with non-solicitous treatment in death and burial as did race, and what I found, to my surprise, was that it did not. While race and class taken together are certainly linked with poor treatment of land associated with death and burial, not so with class standing alone. Instead, what I found was that paupers' cemeteries, sometimes called "potters' fields," were treated equally solicitously as private cemetery lots, as detailed in Part II.A above. As a general rule, paupers' graves have been treated better than slave burial grounds, and so long as the land at issue has been used and maintained as a cemetery, i.e., not abandoned, it will receive solicitous treatment under the law. *See, e.g.*, Leesburg v. First National Bank, 167 S.E.2d 109 (Va. 1969) (holding town had standing to maintain suit seeking judicial declaration that certain lands had been dedicated to town as paupers cemetery); Beroujohn v. Mayor and Alderman of Mobile, 27 Ala. 58 (Ala. 1855) (determining city had responsibility for upkeep of paupers' cemetery).

Nevertheless, sites associated with the death or burial of individuals from the upper middle class or above appear to be treated highly solicitously. *See, e.g.*, discussion of the class composition of the World Trade Center victims and their memorialization in Part IV below, where seventeen percent of the victims had annual incomes above $200,000 and where only 6.25 percent of the victims had annual incomes below $25,000, *9/11 Victim Compensation Fund Final Report, infra* note 151, at 52, by contrast with the Hurricane Katrina victims, whose median family income was $25,759. *See* Wilgoren, *supra* note 96, at A1.

mortal remains and burial objects still intact.[99] After much controversy, including outcry at an initial General Services Administration report concluding that the federal building construction should proceed as originally planned, the site development was halted, with a portion of the land set aside for consecration and reburial of the mortal remains and erection of a memorial.[100] Though much disputed, the African Burial Ground ultimately received National Historic Landmark designation in 1993.[101]

This "happy ending" was achieved only through substantial lobbying and organizing efforts, principally of African-Americans, including then–New York City Mayor David Dinkins, the city's first African-American mayor, and prominent academics at Howard University,[102] and, thus, is entirely consistent with the critical race theory critique elaborated in Part IV below.[103]

99 According to the General Services Administration, approximately 20,000 African-Americans had been interred there between 1626 and Emancipation Day in New York in 1827. Cultural and Env. Affairs Save, Historic Federal Buildings, http://w3.gsa.gov/web/p/interaia_save.nsf (last visited Sept. 5, 2005). Archaeologist Michael Parker Pearson recounts the history of the site's discovery as follows:

> In 1697 the black community was refused the right of burial in the churchyards, and from before 1712 to 1794 the African Burial Ground, outside the city, was used for ten to twenty thousand burials of blacks and outcast whites. When this area of the city came up for redevelopment in the 1980s, the developers, the General Services Administration ["GSA"], commissioned an impact assessment which drew attention to the presence of the cemetery but concluded that the burials had already largely been destroyed by later cellars and foundations. As a result the GSA made no contingency plans for construction in the event of burials being found. When burials were discovered and subsequently announced at a press conference, there was outrage.

MICHAEL PARKER PEARSON, THE ARCHAEOLOGY OF DEATH AND BURIAL 178 (2000).

100 *See generally* Nicholas Confessore, *Design is Picked for African Burial Ground, and the Heckling Begins*, N.Y. TIMES, Apr. 30, 2005, at B1; Alan Finder, *U.S. Suspends Digging at Site of Cemetery*, N.Y. TIMES, July 30, 1992, at B1.

101 David W. Dunlap, *African Burial Ground Made Historic Site*, N.Y. TIMES, Feb. 26, 1993, at B3.

102 The Howard University African Burial Ground Project tested, classified, and oversaw the reburial of 419 sets of remains at the site. *See generally* Confessore, *supra* note 100.

103 A recent *New York Times* report underscored this phenomenon of marginalization by race in burial. The story recounted the failure to mark for 85 years the burial of the body of an unidentified African-American baby girl, who was the victim of the 1919 Texas hurricane and whose mortal remains remained in a drawer at the local funeral home, brought out periodically for curious onlookers, including a local cub scout troop. It was only with the initiative of the new funeral home director that the baby was buried after more than 70 years, albeit without a headstone. The *New York Times* article reported that, at last, a donor had recently paid for a headstone, which cites the baby's affectionate moniker, "Snookems," and states simply, "Unknown Baby Girl, Victim of 1919 Storm.'" Ralph Blumenthal, *At Last, After 85 Years, Baby 'Snookems' Has a Stone*, N.Y. TIMES, Nov. 7, 2004, at A16.

> Her body, along with hundreds of others, had been left at a funeral

Looking to less prominent sites, in *Dove v. May*, the Virginia Supreme Court rejected the landowner's appeal of a lower court order allowing the Virginia State Highway Commissioner to build a road over a slave burial site and move the graves to another location.[104] Likewise, the Louisiana Court of Appeals refused recovery for plaintiffs in the case of *Thomas v. Mobley*, where defendant Mobleys had cleared their land of headstones and other gravemarkers of African-Americans interred since the slave era, to whom the plaintiffs were lineal descendants. The court dismissed the plaintiffs' grave desecration allegation on the grounds that defendants, whose testimony the court accepted as true, had voluntarily undertaken restoration of the graveyard. Though the complaint had been filed *in forma pauperis*, the court assessed one-half of defendants' litigation costs against plaintiffs.[105]

> home, where her mother supposedly promised to return to claim it but never did. Whether out of hope that the mother would someday return or carelessness or callousness, the child, who was black, remained unburied for 70 years, her preserved body laid out in a yellow pinafore in a crepe-lined casket at the Maxwell P. Dunne funeral home in Corpus Christi, seen by only a handful of people who learned the secret. One was James A. Skrobarcek, a local lawyer, who had been allowed a viewing of the mummified body with his Cub Scout troop in the 1950's and was instrumental in finally getting the headstone. Another was a girl at the time whose father had worked at the funeral home. But over the years even they and the funeral home seemed to forget about it.
>
> . . . .
>
> Rose Hill Memorial Park—where hundreds of victims of the storm were buried in a mass grave under a boulder placed by the American Red Cross "in memory of the unidentified dead who lost their lives in the storm of Sept. 14, 1919"—donated a plot in the children's section, and the baby was laid to rest on March 26, 1990. But there was no marker.

Id.

Another recent news report noted the lack of honor given the burials of unidentified Mexican aliens who died while trying to cross into the United States. The fate of one individual was reported as representative:

> [H]e will go into a pauper's grave here in the desert, behind a row of poison oleander bushes, near a trash mound. He will be wrapped in a sheet, placed in a particleboard box, sealed in with eight nails and his grave marked with a cheap concrete headstone. It will read John Doe.
>
> No one will say a word for him. There will be no priest, no prayer, no lamentation. He will go forgotten, next to 220 other men and women who drowned in irrigation canals or succumbed to the sun or were discovered dead in the back of a tractor-trailer crossing into the U.S.
>
> "These are illegals, and people don't care about them," said Martin Sanchez, the gravedigger at the humble Terrace Park Cemetery in Holtville."

Charlie LeDuff, *Just This Side of the Treacherous Border, Here Lies Juan Doe*, N.Y. TIMES, Sept. 24, 2004, at A16.

104 *See* Dove v. May, 113 S.E.2d 840 (Va. 1960).

105 Thomas v. Mobley, 118 So. 2d 476, 482–84 (La. Ct. App. 1960).

And, lest it appear that this is exclusively a southern phenomenon, the New Jersey Superior Court in *Harris v. Borough of Fair Haven* declined to grant an injunction requiring the defendant landowner to repair and maintain a historic African-American burial ground on his property, where the burial ground had fallen into disrepair, reasoning that the landowner could make other legitimate, commercial uses of the land.[106]

B. Conflicted Treatment of Native American Burial Sites

Considered intensely sacred by tribal members,[107] Native American burial sites have been subject to highly conflicted treatment under the law, by contrast again with the special solicitude traditionally granted cemeteries and other burial sites. Rather than eminent domain power being exercised to preserve Native American burial sites, as at Gettysburg, Native American burial sites have themselves been condemned to make way for other uses. Thus, for example, the Fond du Lac Band of Lake Superior Chippewa saw their Wisconsin cemetery grounds condemned by the Army Corps of Engineers for use as a lighthouse station and their mortal remains removed.[108] Likewise, the Crow Creek Sioux Tribe has sought to challenge the U.S. government's attempted transfer to South Dakota of property along the flood plain of the Missouri River that includes Native American burial sites.[109] The federal appeals court ruled that the tribe lacked standing to challenge the transfer because of its failure to establish an actual or imminent injury in fact,[110] where the court construed NAGPRA excavation requirements very narrowly to reach this result.

Claims for recognition of Native American burial sites on federal land, where so many of the sites are found, must steer between a Scylla and Charybdis of Free exercise and Establishment Clause concerns.[111] Specifically, courts have denied protection to Native American burial sites located on federal land on the ground that according special solicitude to Native

106 Harris v. Borough of Fair Haven, 721 A.2d 758, 762 (N.J. Super. Ct. Ch. Div. 1998).

107 *See, e.g.*, Erica-Irene A. Daes, *The Indispensable Function of the Sacred*, 13 ST. THOMAS L. REV. 29, 31 (2000) (Chairperson-Rapporteur, Working Group on Indigenous Populations).

108 *See* Indian Burial and Sacred Grounds Watch (April 2003), http://www.ibsgwatch.imagedjinn.com/learn/2003/2003april.htm.

109 *See* Indian Burial and Sacred Grounds Watch (March 2003), http://www.ibsgwatch.imagedjinn.com/learn/2003/2003marchl.htm.

110 *See* Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912, 916. *But see* Yankton Sioux Tribe v. U.S. Army Corps. of Engineers, 83 F. Supp. 2d 1047, 1060-61 (D.S.D. 2000) (awarding tribe injunctive relief against planned raising of lake water level for flood control purposes by federal government where tribe alleged adverse impact on Native American burial site; mandating federal government fulfill its NAGPRA duty of protection of Native American mortal remains).

111 There is well-developed literature on these questions, and my aim is simply to highlight the principal issues at stake.

American spiritual claims might amount to an official establishment of religion, and/or on the ground that the Free Exercise Clause need not acknowledge Native American spiritual beliefs.[112] As one commentator recently observed:

> A conflict exists between public use and Native American sacred use of National Park lands.... [T]he majority of [] attempts at compromise have not been successful in withstanding First Amendment challenges. On one side, mandatory accommodation measures can be challenged as being violative of the Establishment Clause for governmental promotion of a religion. On the other side, voluntary accommodation measures provide no legal redress for governmental actions which burden free exercise rights.[113]

Illustrating this phenomenon, the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[114] held that the federal government had not violated tribal members' free exercise rights when it proposed construction of a logging road through a parcel of National Forest land used for generations for Native American religious ceremonial purposes, and that to do otherwise might amount to an establishment of religion.[115]

The American Indian Religious Freedom Act ("AIRFA"), while intended to resolve this conflict between the demands of the Free Exercise and Establishment Clauses vis-à-vis Native American sacred sites, among oth-

112 *But see* Exec. Order No. 13007, 61 Fed. Reg. 2677 (1996) (ordering federal agencies to accommodate Native American access to and ceremonial use of Native American sacred sites).

113 Shawna Lee, Note, *Government Managed Shrines*, 35 VAL. U. L. REV. 265, 265–66 (2000).

114 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see also* Employment Division, Dept. of Human Res. v. Smith, 494 U.S. 872 (1990) (compelling governmental interest test not to be applied to laws of general applicability).

The conflict between U.S. and/or private property rights, Native American free exercise interests, and concerns for Establishment Clause violations presented in *Lyng* has been amply addressed in the legal literature, and thus my treatment of *Lyng* and related issues is necessarily brief.

115 *Lyng*, 485 U.S. at 442, 458. The decision in *Lyng* was predicated in part on the Court's refusal to apply *Smith*'s compelling governmental interest test. *But see* Radin, *supra* note 7, at 1006 (citing Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250 (Colo. 1973)) ("One state court held that a condemnor could not take a parcel sacred to a religious sect unless it could show no adequate alternative.")

ers, failed to do so.[116] Enacted in 1978, the Act has been ineffective largely because it has no judicial enforcement mechanism.[117]

By contrast with AIRFA, the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA") has proved instrumental in safeguarding Native American burial sites from excavation, where planned digs must be consented to by the relevant tribal entities and where unintended excavations are to be remedied with an eye to their impact on Native American interests.[118] Relying on NAGPRA's excavation protections, the Yankton Sioux were able to obtain a temporary restraining order against planned construction that implicated a Native American burial site.[119] While NAGPRA's protections are not insignificant,[120] the statute was more

116 The American Indian Religious Freedom Act ("AIRFA") of 1978, 42 U.S.C. § 1996 (2000), provides:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

117 *See Lyng*, 485 U.S. at 455.

118 25 U.S.C. § 3002(c)(2) (2000). This is in addition to NAGPRA's provision for the return from federal custody of Native American mortal remains, sacred objects, and funerary objects. 25 U.S.C. §§ 3001–3013 (2000); *see generally* Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. L.J. 35 (1992) (providing overview of legislative enactment and substantive provisions); Timothy McKeown and Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL'Y 153, 171–75 (surveying major NAGPRA excavation cases). McKeown served as the Designated Federal Official on the NAGPRA Review Committee, *see* NAGPRA REVIEW COMMITTEE REPORT TO CONGRESS FOR 1999, 2000, 2001 (May 2003), *available at* http://www.cr.nps.gov/nagpra/review/Reports_to_Congress/RTCMAY03.PDF.

Many states have followed NAGPRA in enacting excavation, repatriation, and reburial provisions. Indeed, every state plus the District of Columbia has some protective legislation concerning aboriginal mounds, discovery of human remains, sacred site protections, etc. *See, e.g.*, Kansas Unmarked Burial Preservation Act, KAN. STAT. ANN. §§ 75-2741-75-2754 (1989) (not limited to Native American remains or burial sites); Louisiana Unmarked Human Burial Sites Preservation Act, LA. REV. STAT. ANN. §§ 8:671-681 (2006) (not limited to Native American remains, but also citing pioneer, Civil War, and other soldiers' burial sites, though not those of slaves); Massachusetts Unmarked Burial Law, MASS. GEN. LAWS ch. 7, § 38A (specifically providing for protection and preservation of Native American remains accidentally uncovered from unmarked graves); Nebraska Unmarked Human Skeletal Remains and Burial Goods Protection Act, NEB. REV. STAT. §§ 12-1201—1202 (2005) (protections not specific to Native Americans); North Carolina Archaeological Resources Protection Act (providing protection of archaeological sites not specifically limited to Native American remains).

119 Yankton Sioux Tribe v. U.S. Army Corps. of Engineers, 194 F. Supp. 2d 977, 986 (D.S.D. 2002).

120 Estimates of the extent of potentially impacted federal holdings of Native American remains run as high as 18,500. *See* June Camille Bush Raines, *One Is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, *in* NATIVE AMERICAN CULTURAL

than two decades in the making, and its enforcement is subject to the U.S. government's gatekeeping role in recognizing tribal entities, thereby limiting who can benefit under it.[121]

Recently, some tribes have succeeded, in relatively modest fashion, in redressing particular desecratory uses of Native American sacred sites, including burial sites, such as rock-climbing on Wyoming's Devil's Tower National Monument, or "Bear Lodge" as it is known in Native American cultures. The parties in the Devil's Tower case had negotiated an agreement for the voluntary cessation of climbing activity in June, when the most significant Native American worship activities occur there, which a federal court then upheld on appeal.[122]

C. Long-delayed Preservation of World War II–era Japanese-American Internment Camps

On February 19, 1942, President Roosevelt signed Executive Order 9066, authorizing the secretary of war to round up and detain those "individuals of Japanese ancestry located in the United States."[123] This order led to the eventual internment of 120,000 Japanese-Americans between February 1942 and September 1945.[124] The Japanese-Americans were interned under the supervision of the Justice Department, War Department, War Relocation Authority, and Wartime Civilian Control Agency, ostensibly on grounds of national security.[125] Some internees were killed by U.S. service

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AND RELIGIOUS FREEDOMS 309 (John R. Wunder ed., 1996).

121 *See, e.g.*, Clark, *Hands Off*, *supra* note 10.

122 Bear Lodge Multiple Use Assn. v. Babbitt, 175 F.3d 814, 815 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000).

123 I draw on a number of sources in recounting this history, including JOAN Z. BERNSTEIN ET AL., PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (U.S. Gov't Printing Office, Washington, D.C. 1982); ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993); Roger Daniels, *Relocation, Redress, and the Report*, *in* JAPANESE AMERICANS, FROM RELOCATION TO REDRESS 1 (1986); PETER IRONS, JUSTICE AT WAR (1983); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.–C.L. L. REV. 323, 363–68 (1987); Natsu Taylor Saito, *Will Force Trump Legality after September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998).

124 Most of the camps were closed by October 1945, although at least one camp, the Justice Department's internment camp in Crystal City, Texas, did not close until 1947. *See* JEFFERY F. BURTON ET AL., CONFINEMENT AND ETHNICITY: AN OVERVIEW OF WORLD WAR II JAPANESE AMERICAN RELOCATION SITES ch. 17 (2000).

125 Italian-Americans were also briefly interned during World War II, though many fewer and for a much shorter period of time. *See* STEPHEN FOX, THE UNKNOWN INTERNMENT: AN ORAL HISTORY OF THE RELOCATION OF ITALIAN AMERICANS DURING WORLD WAR II 151 (1990).

members on grounds that they were attempting to escape, while others died of natural causes or from lack of medical treatment during their confinement, with the total dead documented at over 1800.[126]

After the war ended, the Japanese-American internment camps were not preserved. Instead, the camps, located in Arizona, Arkansas, California, Colorado, Idaho, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming, were put to a range of other uses both public and private. Some of the sites had been U.S. military bases before their conversion to internment camps, and they continued to be put to military and other governmental uses after the war. Others constituted private property pressed into "public service" by the U.S. military during the war. Some of these were restored to their former uses or other private commercial uses after the war.[127] None of the sites were preserved through eminent domain or historic preservation authority until the 1990s, despite the sites' tremendous significance, culturally, historically, and otherwise.[128] In 1980, President Carter formed a study commission concerning the Japanese-American internments, leading to an official apology and modest monetary redress to those surviving the camps through the Civil Liberties Act of 1988.[129] Donna Nagata reports that it was "also about this time when the first pilgrimages to the sites of former concentration camps began" by multi-generational Japanese-American groups.[130]

Finally, in 1985, as part of a push for redress and reparation for the internments,[131] national historic landmark status was conferred on the Man-

126 U.S. DEPARTMENT OF THE INTERIOR, THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION 145 (U.S. Gov't Printing Ofc. 1946) (War Relocation Authority's final report including data on number of internees who died while interned); *see also* Matsuda, *supra* note 124, at 365 n.170 (recounting, *inter alia*, Japanese American deaths in the internment camps from lack of adequate medical care).

127 U.S. DEPARTMENT OF THE INTERIOR, *supra* note 127, at 145. Those camps that were redeveloped for commercial use represent the mirror opposite of the World Trade Center footprints, where commercial property was decommodified and re-injected into the commons. In the case of the Japanese-American internment camps, properties once under the control of the public authorities were withdrawn from the commons and recommodified.

Concern for the post-war treatment of the Japanese–American internment camps brings to mind, of course, the ongoing status and treatment of Nazi Germany's concentration camps. Specifically, conflict erupted in the 1980s over the Catholic Church's proposed construction of a convent building on or near the site of one of the concentration camps. The proposal was eventually abandoned, but only in the face of a firestorm of controversy, centering, in many ways, on concern for the resulting desecration of the site, albeit through the construction of a religious facility.

128 *See supra* note 124.

129 Called the Commission on Wartime Relocation and Internment of Civilians, it was formed by legislation in 1980. *See, e.g.*, DONNA K. NAGATA, LEGACY OF INJUSTICE: EXPLORING THE CROSS-GENERATIONAL IMPACT OF THE JAPANESE AMERICAN INTERNMENT 186, 190 (1993).

130 *Id.* at 190.

131 In addition to the granting of the writ of *coram nobis* in Korematsu v. United States,

zanar Relocation Center located in eastern California.[132] In 1992, Manzanar was established as a National Historic Site.[133] Then, in January 2001, the Interior Department completed a major study of the conditions of ten of the internment camps,[134] focused largely on the possibility of their preservation and management by the National Park Service.[135] Interior Secretary Bruce Babbitt in his report to the president recommended that the federal government move forward with preserving the sites, again through the exercise of eminent domain and/or historic preservation authority. More specifically, the Interior Department advocated "develop[ing] an interpretive concept plan for all ten Japanese Internment Sites" and "pursu[ing] and/or improv[ing]/increas[ing] National Register of Historic Places or National Historic Landmark designation for each of these sites."[136] While to be applauded and encouraged, these efforts were notably slow in coming,[137] once

584 F. Supp. 1406 (N.D. Cal. 1984), the 1980s saw the enactment of the Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989b–1989b–9 (2000), granting $20,000 to surviving internees and establishing an educational fund for their descendants. The Act acknowledged that "a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II." 50 U.S.C. app. § 1989 (2000).

132 Manzanar had previously been placed on the National Register of Historic Places in 1976. *See* Japanese-American National Historic Theme Study Act, Pub. L. No. 102–248, 106 Stat. 40 (1992)

133 Manzanar was named a National Historic Site pursuant to the Japanese-American National Historic Theme Study Act, Pub. L. No. 102–248, 106 Stat. 40 (1992) (providing "for the protection and interpretation of the historical, cultural, and natural resources associated with the relocation of Japanese-Americans during World War II...."). It opened to the public in April 2004.

134 The report focused on the ten internment camps over which the Interior Department has or had jurisdiction. "Executive Summary," U.S. DEPT. OF THE INTERIOR, REPORT TO THE PRESIDENT: JAPANESE-AMERICAN INTERNMENT SITES PRESERVATION, EXECUTIVE SUMMARY 1 (2001), *available at* http://www.cr.nps.gov/history/online_books/internment/report2.htm.

135 By executive order of November 9, 2000, President Clinton directed the secretary of the interior to conduct a follow-on study to a report on the current conditions of the World War II internment sites, commissioned by the Western Archaeological and Conservation Center of the National Park Service. *See id.*

The Interior Department's report includes general recommendations for proposed actions on the internment sites and specific recommendations for proposed action on each site, including detailed reports about ten of the most important sites (Manzanar, Tule Lake, Granada, Topaz, Heart Mountain, Minidoka, Gila River, Poston, Jerome, and Rohwer). *Id.* at 2–3. According to the Interior Department's report, all ten sites "were assessed by NPS in the mid–1980's and Manzanar was determined to be the best preserved and have the greatest potential as a national park unit." *Id.*

136 U.S. DEPT. OF THE INTERIOR, *supra* note 126, at 1–2.

137 Likewise, Congress' 2000 enactment of legislation authorizing the establishment of the Sand Creek Massacre National Historic Site, memorializing the site of the 1864 massacre of the Cheyenne and Arapaho Indians in Colorado. *See* Angela R. Riley, *Indian Remains; Human Rights: Reconsidering Entitlement Under NAGPRA*, 34 COLUM. HUMAN RIGHTS L. REV. 49, 90–91 (2002). One hundred thirty-six years after the fact, the commitment to honor the dead

again demonstrating the differential use of property law to protect and preserve sites of white and non-white death and burial.

IV. Implications for Critical Theory of Recognizing (or Not) the Consecrated Nature of Land Associated with Death and Burial

Should land touched by human death and burial be treated solicitously under the law? If so, why and how? This is ultimately this Article's normative concern. Consistent with my broader concern for property law's regulation of human attachments to land, I argue that sites associated with death and burial should be given legal solicitude because of the profound personhood interests at stake, where Radin's insight that property can be importantly constitutive of the self applies at least as profoundly to sites of death and burial as to other properties she cites, including family heirlooms and the home.

Radin's property for personhood scholarship was an enormously significant intervention in property law theory,[138] building on Hegel's personality theory regarding the importance of attachment to property to the full development of the self.[139] Stated briefly, Radin, and Hegel, argue that individuals must have control over certain items of property in their immediate environment to become fully constituted selves. Radin grounds her personhood theory in an intuitive understanding that different items of property have different effects on an individual's self-constitution. Her intuition is that

> [m]ost people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.[140]

While Radin does not extend her analysis to death and burial sites, I argue that her insight for the constitutive power of property for personhood applies at least as significantly to these properties as to any other.

Having concluded that land associated with death and burial should be accorded legal solicitude because of its importance to personhood, such

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is welcome but long overdue.

138 *See, e.g.*, Radin, *supra* note 7; *see also* Margaret Jane Radin, Contested Commodities (1996); Margaret Jane Radin, Reinterpreting Property (1993).

139 *See, e.g.*, Hegel's Philosophy of Right ¶¶ 41, 44 (T.M. Knox trans., 1967) (arguing that individual will is embodied in objects in external world).

140 Radin, *supra* note 7, at 959.

solicitude must be granted without disparity as to race, or class, or other attribute, quite to the contrary of what has historically happened. As such, I offer a critical race theory critique of property law's treatment of land associated with death and burial.[141]

By "critical race theory," I reference that body of legal criticism centering issues of race in its analysis, including recognition of the multidimensional nature of racial identity.[142] As critical race scholar Angela Harris notes, "CRT ["Critical Race Theory"] inherits from CLS ["Critical Legal Studies"] a commitment to being 'critical,' which in this sense means also to be 'radical'—to locate problems not at the surface of doctrine but in the deep structure of American law and culture."[143] Critical race theory is often coupled with anti-subordination theory, an analysis of the ways in which law has structured white domination over non-whites.[144] For Harris, and for CRT scholars generally, "racism is not only a matter of individual prejudice and everyday practice; rather, race is deeply embedded in language, perceptions, and perhaps even 'reason' itself."[145] With such recognition, I do not intend to develop an intent-based discrimination theory,[146] but, rather,

141 *See also* DAVID DELANEY, RACE, PLACE, AND THE LAW: 1836-1948 (U. Tex. Press 1998) 7, noting:

> The long struggle against racial segregation demonstrates that the spatiality of racism was a central component of the social structure of racial hierarchy, that efforts to transform or maintain these relations entailed the reconfiguration or reinforcing of these geographies, and that participants were very much aware of this. Space and power are so tightly bound that changing one necessarily entails changing the other. In fact, many contemporary human geographers argue that it doesn't make sense to think of them as 'separate' at all. Space can often be seen as the embodiment of power; power as the point of spatial differentiation.

Id.

142 In developing my critical race theory critique of the differential treatment of death and burial sites, I looked, *inter alia*, to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw ed., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes ed., 2003); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993); Darren Lenard Hutchinson, *Foreword: Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187 (2004); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); Charles R. Lawrence, III, *The Id., the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Mari Matsuda, *supra* note 123.

143 Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994).

144 *See, e.g.*, CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (discussing anti-subordination theory in specifically feminist context); Denise C. Morgan, *Anti-Subordination Analysis after* U.S. v. Virginia: *Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381 (providing an example of anti-subordination theory in critical race feminist context).

145 *Id.*

146 I recognize the difficulty of satisfying the Court's discriminatory intent standard

draw on Charles Lawrence's important work on unconscious racism, namely *The Id, The Ego, and Equal Protection*, in which he argues that the Supreme Court has adopted an unduly crabbed understanding of intent that fails to account for unconscious racism.[147] Unconscious racism can be a powerful force driving human behavior and legal decisionmaking, and surely con-

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as articulated in *Washington v. Davis*, where equal protection violations will be found only where the law at issue is discriminatory on its face or where the law's discriminatory purpose becomes manifest through its application. Washington v. Davis, 426 U.S. 229 (1976) (holding heightened scrutiny applicable only to cases with proof of discriminatory intent); *see, e.g.*, Darren Lenard Hutchinson, *Unexplainable on Grounds Other Than Race': The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 ILL. L. REV. 615 (2003); Jason Gillmer, Note, United States v. Clary, *Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 506-07 (1995). My critical race critique would likely have stronger footing in the discriminatory application prong than in the overt purpose prong.

147 Charles R. Lawrence III, *supra* note 142, 322–23 (1987):

> There are two explanations for the unconscious nature of our racially discriminatory beliefs and ideas. First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right....
>
> Second, the theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.
>
> In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.

See also Barbara Flagg, *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 980 (1993) (observing "the threshold requirement that the constitutional plaintiff prove discriminatory intent operates to draw a sharp distinction between facially neutral but unconsciously race-specific instances of white decisionmaking, on the one hand, and the deliberate use of race, whether overt or covert, on the other; only the latter is constitutionally impermissible. Relying on a distinction among discriminators' states of mind seems a curious strategy for implementing the principle that the use of race as a criterion of decision is what constitutes the constitutional harm, because the racial criterion is equally present in either case. Indeed, the chosen rule appears more suited to drive the race specificity of white decisionmakers underground—out of whites' awareness—than to eradicate it altogether.").

tributes to the differential valuation placed on white and non-white death and burial sites as reflected in their different legal treatment.

As the examples in Parts I, II, and III suggest, race is an important factor in understanding whether and what degree of legal solicitude is accorded land associated with human death and burial.[148] Hierarchies of race and ethnicity segregate people in death, with the land on which they died and/or were buried treated differently. Gerald Torres and Lani Guinier offer yet another example of this phenomenon in *The Miner's Canary*, where they tell of a plaque at a local courthouse "commemorating World War I ... veterans by color," with "'white' on top, 'Indian' in the middle, and 'colored' on the bottom."[149]

I am, of course, quick to note that the critical race critique is not an all-or-nothing proposition, where such dichotomies are counter-productive. It is not a question of whether the difference in legal treatment is fully ascribable to questions of race or not, or, alternatively, to questions of national security or not, but, rather, to recognize that race is a critical element of the story, and that national security is a critical element of some of these stories also. It is beyond question, for example, that the September 11th strikes against the World Trade Center would and should be memorialized, given the site's significance as the locus of the most significant foreign-sponsored terrorist attacks in the United States. What was surprising was the alacrity with which consensus formed that the fitting tribute to the dead was to decommodify the site altogether. Thus, again, the question is not so much whether the World Trade Center footprints would be preserved, but, rather, whether they would be preserved unquestioningly or only haltingly.

Staying for the moment with the World Trade Center site, the September 11th Victim Compensation Fund places the racial composition of the victims there at 75.9 percent non-Hispanic white, 9.4 percent Hispanic, 7.9 percent non–Hispanic black, 6.3 percent Asian and Pacific Islander, and 0.4 percent other.[150] I recognize, of course, the striking race and class disparities

148 *See* Greg Owen et al., *The Sociology of Death: A Historical Overview, 1875–1985*, *in* DEATH AND IDENTITY 80, 93 (Robert Fulton & Robert Bendiksen eds., 3d ed. 1994) ("In his 1950 study of American cemeteries, Kephart showed that social class is reflected and maintained after death by the manner in which the dead are buried."); *see also* MICHAEL C. KEARL, ENDINGS: A SOCIOLOGY OF DEATH AND DYING 52 (Oxford Univ. Press 1989) ("We are stratified in death as we are in life. In contemporary American society, the location of burial is still determined on the basis of race, ethnicity, religion, and social class .... Cemeteries serve as central cultural totems for the living.").

149 GERALD TORRES & LANI GUINIER, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 77 (2002).

150 WTC Statistics, http://www.september11victims.com/september11victims/wtc_statistics.htm (relying on a preliminary New York City Health Department report on the WTC victims' demographics, which was in turn based on 2617 death certificates filed with the city, including those on behalf of the two planes' passengers and crews) (last visited May 8, 2006).

The Fund's website also provides a breakdown of the countries of origin, and foreign

among the victims, where the financial services executives were disproportionately white with significant incomes, while the service workers, including the restaurant workers, were not. By contrast with the World Trade Center site as a whole, the slave burial grounds, the African Burial Ground, the Native American burial sites, and the Japanese-American internment camps were exclusively non-white. And, while it took a highly organized campaign on the part of well-placed African-American politicians and academicians to preserve the African Burial Grounds, and a similar effort on the part of Japanese Americans to preserve the World War II–era internment camps, it is unclear the extent to which the 9/11 victims' families are key to the preservation of the World Trade Center footprints. Surely they have been influential in monitoring the planning for the site, with a subset of the families successfully defeating plans for the International Freedom Center and Drawing Center on that site,[151] but the footprints would likely have been preserved anyway, given the widespread public sentiment on that issue.

Pierre Bourdieu argues that law "consecrates" power relations.[152] That the law should be employed in such a way as to give more recognition to

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citizenship, of all September 11th victims, including those in the Pentagon attack and the Pennsylvania crash site. U.S. Department of Justice's September 11th Victim Compensation Fund, September 11, 2001 Victims: Victims By Country and Citizenship, http://222.september11victims.com/september11victims/COUNTRY_CITIZENSHIP.htm. The site makes clear which statistics go to the World Trade Center victims standing alone, and which encompass all of the September 11th victims.

151 *See, e.g.*, Pogrebin, *supra* note 88, at E33. Now the 9/11 families are beginning to target the planned retail space as well. Dunlap, *supra* note 88, at B1, reporting:

> [T]he executive director of the [Port] Authority said that none of the retail space would be within the memorial quadrant, which is the site of the twin tower footprints and is seen as untouchable for uses other than those related to 9/11 ...
>
> Yet there is a chance that retail space around the quadrant could come in for some of the same criticism that felled the Freedom Center: that it would detract from the solemnity of the memorial.
>
> "Are they going to have Victoria's Secret selling underwear?" asked Charles Wolf, a leader in the fight against the Freedom Center, whose wife Katherine Wolf worked in the North Tower and was killed on September 11. "Who knows? The fact of the matter is that families have a right to deal with the memorial quadrant and its environs. How hypocritical will it be for us to have a totally 9/11-related memorial quadrant and directly across Greenwich Street you have shops facing it which, overtly by their signage, are inappropriate?"

Id.

152 PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 188 (Cambridge Univ. Press 1977).

> Law does no more than symbolically consecrate—by recording it in a form which renders it both eternal and universal—the structure of the power relation between groups and classes which is produced and guaranteed practically by the functioning of these mechanisms.... The law

burial sites of whites than non-whites is unsurprising when viewed through this lens. Indeed, in reflecting on the difference in treatment, a dynamic emerged that where an individual, or their racial affiliation group, had been treated as property in life, then the land on which they died, or in which they were buried, was not treated solicitously and was not decommodified in death, i.e., not treated as beyond the market. Take, for example, slave burial grounds, which have been largely unprotected. Rather than being taken off-market in honor of those whose remains are interred there, these sites are regularly ignored or discounted as burial lands and returned, or maintained in, the flow of commerce. As such, there appears to be an inverse correlation between commodification of bodies in life and decommodification of land in death.

I also noted a distinctive pattern whereby Native American burial sites were "religified" in a manner underscoring potential Establishment Clause concerns and thus precluding legal protection, while conventional religious burial sites, such as churchyard cemeteries, have been granted significant solicitude under property laws.

Before concluding that the difference in treatment of death and burial sites is explainable by reason of race, I sought to explore other non-discriminatory motives in an effort to determine whether they satisfactorily explain the difference. The public versus private ownership of the sites in question, for example, turns out to be an unsatisfactory explanation for the difference in treatment, where the sites of disproportionately white death whose title was held privately were brought into the public realm by virtue of eminent domain, as with the Gettysburg battlefield, or through protracted negotiation with private and public parties, as with the World Trade Center. By contrast, the hotly contested, long-delayed, preservation of the African Burial Grounds, which were entirely on public property, and the Japanese-American internment camps, many of which were on federal property, and thus neither requiring acquisition of title, demonstrates the inadequacy of the public/private distinction as an explanation for the difference in treatment.

Nor is the public versus private nature of the crises befalling the sites necessarily a satisfactory explanation for their difference in treatment. While the World Trade Center was the site of an unprecedented national security crisis (the first, and second, foreign-sponsored terrorist attacks on American soil[153]), the Japanese-American internment camps were themselves premised on a national security crisis but were not the subject of

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> thus contributes its own (specifically symbolic) force to the action of the various mechanisms which render it superfluous constantly to reassert power relations by overtly resorting to force.

Id.

153 Here, I am referring to both the 9/11 attack and the February 27, 1993 bombing of the World Trade Center garage.

significant historic preservation efforts until just very recently. Of course, one way to understand this difference is that the World Trade Center site became a rallying point for national unity and pride for many, while the internment camps are a source of national shame.

Stemming directly from this last observation, another possible basis for distinguishing among the examples cited in Parts II and III is an understanding that those properties associated with a shameful history, *e.g.*, slave burial grounds and the Japanese-American internment camps, are shunned from public consciousness and not preserved, while those serving as a rallying cry for nationalist pride, e.g., the World Trade Center site, the Gettysburg battlefield, and Pearl Harbor, are preserved. Of course, the associations with shameful history cited above are likewise associations with historically subordinated minorities within the United States.

Victims' status as heroes, or not, and/or as sympathetic, or not, is another related potential basis for distinguishing between what land is deemed consecrated by their deaths and given legal solicitude, and what is not. Nevertheless, the definition of who is a hero or who is sympathetic is immensely subjective and susceptible to disparate treatment along racial lines. Status as a hero or sympathetic victim is more readily granted when the victims are white, as disproportionately true in the World Trade Center example, and less readily so when the victims are non-white, as with the Japanese American internment camps (or the MOVE firebombing crisis in Philadelphia in the mid 1980s).[154]

Yet another explanation for why the World Trade Center footprints were decommodified while other sites, including that of the Triangle Shirt Waist factory fire, for example, were not is that the World Trade Center attack occurred during a period of relative prosperity, while the Triangle fire did not. In the early part of the twentieth century, emphasis was on full and rapid commercial and industrial development, and so decommodification of the Triangle site was neither possible nor desirable. The site was instead commemorated by two plaques.[155] By contrast, the state of the economy at the time of the September 11th attack enabled the decommodification of that site, even despite its status as some of the most valuable real estate in the world. Arguably relevant to the redevelopment planning for the World Trade Center site is the fact that the devastation wrought by the September 11th attack led to a depressed real estate market in Lower Manhattan, thereby reducing the value of the World Trade Center parcel and making its decommodification less costly, though nevertheless remarkable.

154 *See, e.g, 2 Members of Radical Group Are Buried In Pennsylvania*, N.Y. TIMES, Dec. 6, 1985, at A28.

155 Likewise, the Chicago Fire of 1871 and the San Francisco earthquake of 1906 were not commemorated in the fashion of the World Trade Center footprints, where not only was the damage and loss of life widespread, rather than concentrated, but the state of the economy would not have encouraged or allowed such commemorative uses (or non-uses).

In the end, preservation of land associated with death and burial of non-whites can be a powerful form (among others) of reparation for histories of racial oppression. To be clear, it would not be sufficient standing alone, but, rather, can be an important tool in combination with others. The decision to use property law 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, relationships, good will, etc.—of reparation at its most fundamental level.[156] Instead, non-whites have been largely barred from the realm of the sacred (again, humanistically understood), and their suffering has been largely excluded from the commons of public experience and consciousness, through the less, or un-, solicitous treatment of their death and burial sites, thereby undermining their ultimate humanity through relegation to the world of the profane.[157]

CONCLUSION

A. Thoughts on Tragedies "in" the Commons and the Recognition (or Not) of Land's Consecration Through Association with Human Death and Burial

The modifications to property law doctrine explored in Part I above can be, and often are, used to bring private tragedies into the commons of public experience, reinfusing sites of death and burial into the public domain of physical access and civic consciousness.[158] In referencing tragedies "in" the

156 Having noted the potential reparational nature of the decision to commemorate human tragedy through the preservation of land associated with death and/or burial, I wish to at least take a crack at articulating a theory of reparations, i.e., why are reparations necessary or justified in response to human tragedy? What goals do they serve? As a public acknowledgement of wrong-doing? As a symbolic welcoming into full citizenship for those who have been historically denied participation on equal terms?

In seeking to articulate a theory of reparations, I recognize the need to articulate the most significant objections to reparations, principally those grounded in concerns for the magnitude of the cost and for whether past wrongs can or should be redressed through present-day remedies. *See, e.g.*, Matsuda, *supra* note 124, at 373–74 (enumerating standard objections to reparations claims as: "(1) factual objections and excuse or justification for illegal acts; (2) difficult identification of perpetrator and victim groups; (3) lack of sufficient connection between past wrong and present claim; and (4) difficulty of calculation of damages"). Rather than approaching the question of form of redress as one of either/or, i.e., either commemoration through memorializing site or payment of damages, I argue that commemoration through public recognition of land's consecration is one of several tools that can be drawn on in a reparations effort, e.g., the preservation of slave burial grounds as well as the payment of damages to the descendants of slaves.

157 Again, as so powerfully illustrated in the recent devastation in New Orleans.

158 In a related fashion, in *Elementary Forms of Religious Life*, Durkheim hypothesizes that the object of worship in indigenous societies is society itself. *See* Emile Durkheim, *Concerning*

commons in the title to this section, I wish to be clear that my concern here is for the uses to which actual tragedies are, and have been, put, i.e., the extent to which tragedies are, or have been, incorporated into the "commons" of public experience, and not for Garret Hardin's concern for the metaphoric tragedy "of" the commons arising from law's failure to incentivize investment in commonly held property.[159]

Consider in this vein Civil War battlefields. Though soldiers fought and fell principally on private farm land, these sites were brought into the commons of public access and memory by the exercise of eminent domain, rendering them explicitly public property. Not only did this give the public ready physical access to Civil War sites, but it promoted the public's awareness of the deaths that had occurred there. Likewise with the World Trade Center, where, by decommodifying the World Trade Center footprints and reinfusing them into the commons for use as a public memorial, redevelopment officials have assured the public's ready physical access to the site and ongoing consciousness of the loss of life suffered there.

By contrast, the Japanese-American internment camps, with many situated on public lands, remained far outside the "commons" of public access and consciousness until very recently.[160] As a result, the tragedy of the

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the Definition of Religious Phenomena, *in* DURKHEIM ON RELIGION: A SELECTION OF READINGS WITH BIBLIOGRAPHIES 93, 98 (W.S.F. Pickering ed., 1975). Historian John R. Gillis posits the development of an American civic religion premised on worship of society in his work on nineteenth century monument and memorial-building. John R. Gillis, *Memory and Identity: The History of a Relationship*, *in* COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY 19 (John R. Gillis ed. 1994) (noting "[i]n the course of the nineteenth century, nations came to worship themselves through their pasts, ritualizing and commemorating to the point that their sacred sites and times became the secular equivalent of shrines and holy days.").

Where fundamental spiritual impulses are directed toward one's society of origin, the loss of one or more members of that society is understandably cause for grief and memorialization, especially so when the loss of life is on a large scale. Pursuant to the Durkheimian model, we can see the potential for greater solicitude afforded those "like us," i.e., like the majority or dominant people, whose death is experienced directly, not distantly, with the result that their loss is treated solicitously under the law. By contrast, the death of those not "like us," variously understood as the "Other," the "outsider," the subordinated, is treated at best ambivalently and more often negligibly, where the loss is experienced, if experienced at all, indirectly and remotely. This phenomenon is amply well illustrated by the federal government's initial failure to respond to the devastation and loss of life wrought by Hurricane Katrina in New Orleans.

159 *See, e.g.*, Hardin, *supra* note 5.

160 The Japanese-American internment camps entered the commons of public access and consciousness only through a concerted campaign for redress and reparations, which culminated in many respects in the 1988 Civil Liberties Act, granting $20,000 to all surviving victims of the camps and creating an educational fund accessible to the descendants of the camps. Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b–4 (2000).

By comparison, the Triangle Shirt Waist factory and Happyland Social Club sites were never brought into the public domain, either physically or metaphorically, thus remaining tragedies outside the commons.

World War II detentions and the detainees' deaths remained private tragedies, largely invisible to the public eye and unrecognized in the public mind. Though located on federal land, and thus already in the commons as a *de jure* matter, New York City's African Burial Grounds were only very recently brought into the actual, *de facto* commons of public access and consciousness through concerted lobbying efforts, principally of people of color.

Sociologist Arnold Van Gennep, in examining separation, transition, and incorporation rites in society, observed that burial rituals constituted not so much separation rites from society, or even transition rites between life stages, but, rather, incorporation rites into society.[161] With this in mind, I argue that the official memorialization of dead whites, whether achieved through the setting aside of land at the World Trade Center or in the Civil War battlefields, constitutes a rite of incorporation into the public domain of physical access and civic consciousness. Through commemorative rituals, including the invocation of dedication, eminent domain, and/or historic preservation rules, the deaths are incorporated into the public experience and collective memory.[162] The failure to memorialize non-white deaths serves then to exclude, or at a minimum fails to include, these losses from the commons of public experience, thus prohibiting their incorporation into the wider social consciousness—into society at large, as Van Gennep has written.[163] In the end, the failure to treat non-whites equally reveren-

161 Van Gennep, one of the leading early theorists on totem and taboo, gave special attention to rites of passage as they relate to systems of totem and taboo in indigenous cultures, classifying these rites into three groups: those related to separation from society (e.g., sexual maturation rites and separation of males from females); those related to transitions between phases in society (e.g., pregnancy); and those related to incorporation into society (e.g., birth and marriage). VAN GENNEP, *supra* note 7, at 146.

162 Religious studies scholar Gary Laderman argues, for example, that Lincoln sought to establish a national cemetery at Gettysburg so that those deaths could not be forgotten. Laderman writes, "While he may have thought that the words commemorating their struggle would soon be forgotten, Lincoln realized that a national cemetery on Union soil would inscribe their sacrifice into national space as well as collective memory," thus underscoring the unique power of land, and its preservation through use of property law, to shape public memory. GARY LADERMAN, THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH, 1799-1883, 126 (1996).

163 Laderman has likewise written in the religious studies literature of the government's preservation of certain sites, but not others, on the basis of "whose significance reflects the principles and mission of the nation." He continues:

> Assuming a role once reserved for the church, the state confers immortality on particular national heroes and sacrality on specific locations that solemnize the sacrifices and triumphs of American citizens. In addition, the maintenance of graves, museums, and memorial contributes to the construction of sacred places on the American landscape; the celebration of such national holidays as Presidents' Day, Martin Luther King Jr. Day, and Memorial Day establishes the sacred time by which citizens orient themselves. The cosmology of American political life is saturated

tially in death as whites through the lesser legal, and cultural, solicitude granted sites associated with non-white death is a tragedy visited on our civic commons.[164]

B. Words of caution on potential dangers of asserting the "consecrated" nature of land

This Article has noted some of the most important doctrinal and theoretical implications of recognizing the "sacred" character of land associated with human death and burial, a subject not previously addressed in the legal literature. In concluding, I wish to offer a few words on the potential dangers of asserting the sacred nature of land, as when the European conquerors of the so-called "New World" characterized their acts of "discovery" as consecrating the land in the name of their god (and sovereigns), thereby stripping the land from the "godless natives" (their words) then inhabiting it.[165]

Historian of religion Mircea Eliade, for example, celebrated colonizers' power to consecrate land, remarking, "A territory can be made ours only by creating it anew, that is, by consecrating it. This religious behaviour in respect to unknown lands continued, even in the West, down to the dawn of modern times." Citing the Spanish and Portuguese conquistadores as examples, Eliade noted, uncritically, that they "took possession of [their new territories] in the name of Jesus Christ," and how "[t]he raising of the

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with death and the bones of the dead.

Id. at 6; *see also* Clark, *Hands Off*, *supra* note 10, which critiques the state's disposition of dead bodies to serve its own ends, including shaping ideas of nationalism and self-sacrifice in service of nation.

164 If something is memorialized, then it has been incorporated into society—tragedies "in" the commons for white deaths and not non-white.

> I have tried to assemble here all the ceremonial patterns which accompany a passage from one situation to another or from one cosmic or social world to another. Because of the importance of these transitions, I think it legitimate to single out rites of passage as a special category, which under further analysis may be subdivided into rites of separation, transition rites, and rites of incorporation. These three subcategories are not developed to the same extent by all peoples or in every ceremonial pattern. Rites of separation are prominent in funeral ceremonies, rites of incorporation at marriages. Transition rites may play an important part, for instance, in pregnancy, betrothal, and initiation....

VAN GENNEP, *supra* note 7, at 10–11.

165 Thus, for example, official recognition of land's "consecration" by the discovery, use, and even deaths of whites is very much at issue, and on display, in Justice Marshall's opinion in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In a related manner, some public officials claimed that the U.S. acquired the Micronesian territory with the dead bodies of its soldiers, and that, having done so, the United States consecrated the soil anew. *See* Kathleen M. Burch, "The U.S.A. as a Colonial Power: The Case of the State of Yap, Federated States of Micronesia" (paper presented at the Sept. 11, 2004 Feminism and Legal Theory Workshop, Emory Univ. Law School; copy on file with author).

Cross was equivalent to consecrating the country, hence in some sort to a 'new birth.'"[166]

Given the force, and currency, of such rhetoric today, with our "reconstruction" of Iraq very much in mind, it is essential to acknowledge the potential for abuse in asserting land's "consecration" through human death and burial. This paper has sought to do that and, in the process, to invite further consideration of these questions. Nevertheless, using law to recognize land's consecration through association with death and burial, when done in a non-discriminatory manner, can be a powerful tool of reparation and empowerment, honoring and enhancing personhood.

EPILOGUE: DEATH AND BURIAL IN THE WAKE OF HURRICANE KATRINA

One need look no further than to Katrina-devastated New Orleans to see yet another example of the failure to bring the suffering and deaths of non-whites, principally African-Americans, into the commons of public experience. Government at all levels failed adequately to respond to this tragedy in its immediate aftermath at least in part, I argue, because the devastation to non-whites, principally poor non-whites, was under-valued and under-seen,[167] consistent with the unconscious racism hypothesis articulated above.[168] Thus, as with the prior examples, it was only with significant external pressure that the governments proceeded to use property and other legal rubrics to bring this tragedy into the commons.

166 Eliade, *supra* note 7, at 31–32. Kant, of course, rejects this colonizing and consecrating, or "reconsecrating," impulse, *see, e.g.*, ALLEN W. WOOD, KANT 178 (2005), as do I.

167 *See* Wilgoren, *supra* note 96, at A1 (indicating 76% of those living in areas with significant flooding were African American, and median household income of those living in affected areas was $25,759); *see also* Broder, *supra* note 96, at A9.

168 *See, e.g.*, Elizabeth Bumiller, *Gulf Coast Isn't the Only Thing Left in Tatters; Bush's Status with Blacks Takes a Hit*, N.Y. TIMES, Sept. 12, 2005, at A17 (reporting, "Many African-Americans across the country said they seethed as they watched the television pictures of the largely poor and black victims of Hurricane Katrina dying for food and water in the New Orleans Superdome and the convention center. A poll released last week by the nonpartisan Pew Research Center bore out that reaction as well as a deep racial divide: two-thirds of African-Americans said the government's response to the crisis would have been faster if most of the victims had been white, while 77 percent of whites disagreed."); *see* Lawrence, *supra* note 143 and accompanying text.