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Grave Matters: The Ancient Rights of the Graveyard

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Abstract

Descendants of people buried in cemeteries on private property have a common law right to access that property to visit the cemetery. That right, which is akin to an implied easement in gross, is recognized by statute in about a quarter of states and by case law in many others. Grave Matters *explores the origins, nature, and scope of the little-recognized right and its implications for property theory. It discusses the right as part of well-established property doctrine and its relationship to recent takings cases, as well as the related corollary graveyard right against desecration and the right of communities to relocate cemeteries.*

The right of access, which traces its roots to the early the nineteenth-century, is important because it is one of the few implied rights of access to private property. It limits, by implication, the right to exclude, which is at the core of property rights. Thus, it offers a way of getting access to property without facing a takings claim. Moreover, the right is important because it reminds us that there are limits of the right of exclusion, which were recognized at common law. The right of relocation further illustrates the careful balancing of property rights with the community's right. Thus, the graveyard rights together emerge as vestiges of the nineteenth-century's consideration of community and property. A final section suggests the importance of the right of access for recent discussion about reparations for the era of slavery, for the right of access provides a property right (an easement) in descendants of slaves buried on plantations to access those plantations. The property held by descendants provides important symbolic connections between the past and present and offers hope of a lawsuit for reparations that is not barred by the statute of limitations.

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> The system of property and law goes back for its origin to barbarous and sacred times; it is the fruit of the same mysterious cause as the mineral or animal world. There is a natural sentiment and prepossession in favor of age, of ancestors, of barbarous and aboriginal usages, which is a homage to the element of necessity and divinity which is in them. The respect for the old names of places, of mountains, and streams, is universal. The Indian and barbarous name can never be supplanted without loss.
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> Ralph Waldo Emerson, *The Conservative*[2]

Ralph Waldo Emerson's oration *The Conservative* recognized the power that ancient ideas and practices hold over the minds of individuals. The reverence that grows up around long-standing uses is a frequent justification for property rights.[3] When people have used property in a way for an extended period of time they come to believe that other uses cannot interfere with theirs, that they have a claim against the entire world.[4]

Emerson's oration also recognized the reverence we pay to ancestors. That reverence is rarely deeper than in cemeteries. In cemeteries that are located on private property, then, meet two ancient, powerful ideas: the right of property owners to exclude and the veneration of age and of ancestors. That conflict between the right to worship at our ancestors' graves and the right to exclude appears with increasing frequency these days, as landowners seek to develop cemeteries and descendants of people buried in the cemeteries seek to reclaim something of their

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[2] Ralph Waldo Emerson, *The Conservative*, in RALPH WALDO EMERSON: ESSAYS AND LECTURES 177 (Joel Porte ed., 1983).

[3] *See*, *e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3-4 (1765) (quote).

[4] *See, e.g.,* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897) ("A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.").

heritage. For many descendants want to visit the graves of their ancestors. Those graves are, however, frequently on private property. So conflicts now frequently arise over the maintenance of cemeteries and over access to them.[5] The conflict appeared recently in a now generations-old dispute between the Hatfields and the McCoys in Kentucky, when descendants of the McCoys want access to a graveyard containing five of the six McCoys killed in feuding in the late nineteenth century. A Hatfield descendant refuses them access.[6] It is appropriate, given how important property rights have become and how important property was to the origins of the feud in the nineteenth century, that the feud once again turns on property rights. The current feud also illuminates an ancient–and rarely discussed–right of families of people interred in cemeteries and the ways those rights limit what we think of as central rights of property owners.

This article explores in depth one ancient right associated with graveyards–the right to access graves of ancestors, even if they are on private property; and it discusses in more cursory fashion several corollary rights: the prohibition against desecration of graves and the right to

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[5] A sampling of the conflicts appear in Ceri Larson Danes, *Slave Cemetery vs. Waterfront Access; Nearby Landowners Ask Judge Permission to Build Road over Old Wilsonia Neck Burial Site*, EASTERN SHORE NEWS (February 9, 2005) (neighboring landowners seek easement to cross slave cemetery to access water); *Boone Society Concerned over Sale of Stemme Farm*, JOPLIN INDEPENDENT (May 17, 2005) (concern over access to grave of Daniel Boone, located on private property in Missouri); Alex Davis, *Developer Might Change Plan, Not Move Clark Cemetery*, LEXINGTON COURIER-JOURNAL (May 20, 2005) (questioning moving of cemetery); Roxana Hegeman, *Forgotten Black Cemetery Rallies Kansas Community*, KANSAS CITY CALL (February 21, 2003) (maintenance of African American cemetery); *Final Resting Places Meet Progress: Airport Project Protects Graves*, ATLANTA JOURNAL CONSTITUTION C1 (June 19, 2005); Jessica Brown, *Cemeteries Succumb to Time, Crowding; Efforts Made to Preserve Lost, Neglected Pieces of History*, CINCINNATI ENQUIRER (July 25, 2005).

[6] Alfred L. Brophy, *Hatfields and McCoys Feud Over Graveyard*, PROVIDENCE JOURNAL (January 13, 2003); Roger Alford, *Hatfield–McCoy Case Set for Trial*, TUSCALOOSA NEWS 4B (December 29, 2002).

burial. Those rights work in tandem, to protect graves and the right to visit them. While those rights are rarely exercised, they are of importance to the those who choose to exercise them. Many others, if they knew their rights, might choose to exercise them.[7] And those rights, which are some of the only common law rights to access another's property,[8] offer important insight into the nature of property rights. We can see how the common law harmonized rights to exclude with other, overlapping community interests. It reminds us that, while the right of property (such as the right to exclude and to use property as one would like) are of critical importance, there are limitations on those rights.

I. Disputing at the Graveyard's Gate

I find this vast network, which you call property, extended over the whole planet. I

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[7] Georgia's Historic Preservation Division of its Department of Natural Resources, for instance, counsels on its website that "even descendants or heirs should ask the landowner for permission to come onto the property and discuss notification of intent to visit, the frequency of visitation, and passageway to be used." *See* "How do I gain access to a cemetery on private property?," available at: http://hpd.dnr.state.ga.us/content/displaycontent.asp?txtDocument=96 While the advice is sound from the perspective of harmony, it may leave readers with the impression that they can only visit cemeteries at the sufferance of the landowner. *See also* CHRISTINE VAN VOORHIES, GRAVE INTENTIONS: A COMPREHENSIVE GUIDE TO PRESERVING HISTORIC CEMETERIES IN GEORGIA (2003).

The website of the Virginia Department of Historic Resources ("Helping you put Virginia history to work") provides incorrect advice on the scope of the landowner's rights. In response to the question, "what are my legal rights and obligations" if there is an old cemetery on my property, it states that "Virginia law protects the cemetery itself from malicious damage, but does not require a property owner to maintain it or to allow anyone to come on your land to visit the cemetery. Both are your choice."
http://www.dhr.virginia.gov/homepage_general/faq_cem_%20presv.htm
Virginia has a statute providing for access, however. *See* Va.Code § 57.27.1.

The Alabama Historical Commission's pamphlet on cemetery preservation makes no mention at all of the right to access cemeteries on private property. *See* AHC CEMETERY PRESERVATION GUIDE, available at: http://www.preserveala.org/overallprogram.pdf

[8] As described below, the easement for access to cemeteries is a form of easement by implication. *See infra* I.A.

cannot occupy the bleakest crag of the White Hills or the Allegheny Range, but some man or corporation steps up to show me that it's his.

Ralph Waldo Emerson, *The Conservative*[9]

Emerson captures well Americans' love of property. At the center of that love are the rights to alienate,[10] to use as the owner chooses,[11] and to exclude others.[12] There are, of course, notable limitations on those rights. Courts enforce limited restrictions on the right of an owner to alienate;[13] they will enjoin as nuisances (or at least require compensation) uses of property that impose unreasonable interferences on neighbors.[14]

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[9] Emerson, *The Conservative*, *supra* note 2, at 180.

[10] Courts routinely protect the right to alienate to whomever the owner wishes, by sale *Shelley v. Kraemer*, 334 U.S. 1 (1948), as well as by gift, *Hodel v. Irving*, 481 U.S. 704 (1987).

[11] Courts routinely uphold the right to use property as the owner wishes, unless the use is a common law nuisance or violates zoning ordinances adopted before the use began. *See, e.g.,* (refusing to enjoin African American church as a nuisance); (refusing to apply zoning retroactively). Nuisance serves as a mediating doctrine, which balances among competing and reasonable uses of property. *Compare* Amphitheaters, Inc. v. Portalnd Meadows, 198 P.2d 847 (1948) (interference with neighborhood drive-in movie theater not a nuisance because theater was particularly sensitive). The vast literature on nuisance, much of which deals with these issues, include MORTON J. HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); James W. Ely, *Property Rights and Environmental Regulation*, 28 HARV. J. L. & PUB. POL'Y 51 (2005); Daniel Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET (Peter Hay & Michael Hoeflich eds. 1988); Louise Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89 (1998).

[12] *See, e.g.,* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (1997).

[13] *See, e.g.,* Pritchett v. Turner, 437 So.2d 104 (Ala. 1983) (upholding forfeiture restraint on alienation to one family member).

[14] Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970); RESTATEMENT (SECOND) OF TORTS § 822 (focusing on unreasonableness for determination of private nuisance), § 826(a) (balancing utility against harm for judging unreasonableness), § 826(b) (establishing unreasonableness when "conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible"); § 829A ("an intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

Court will enforce express easements to allow others to cross property. They will also imply easements in cases of estoppel, such as when the owner of the property has granted access in the past and those seeking access have made expenditures in reliance on that access,[15] or in cases of necessity, when a parcel of property is divided and sold, leaving one part landlocked,[16] or in cases of prior use, when a parcel is divided and, prior to division, one part of the parcel made use of the other part. Courts also create an easement for access after long-term, prescriptive use.[17] There are occasional times when private individuals have the right of access on private property. Perhaps the best known is the right of union organizers to visit employers' property to organize. There are more limited rights to distribute literature on private property. Sometimes the basis is based on the belief that private property has taken on all the attributes of public property, as in *Marsh v. Alabama*.[18] However, the line of reasoning that likens private property to public property seems to have run out. Still, there are occasional cases that permit pamphleting on private property, such as malls and universities.[19] One court has found a public right to cross private property to for beach access, at least when that private owners have joined together and

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the harm resulting from the invasion is severe and greater than the other should be required to beat without compensation").

[15] *See, e.g.,* Rase v. Castle Mountain Ranch, 631 P.2d 680 (Mont. 1980).

[16] *See, e.g.,* Othen v. Rosier, 226 S.W.2d 622 (Tx. 1950) (denying easement by necessity because claimant failed to show necessity existed at time of division of parcel).

[17] *See, e.g.*, Community Feed Store, Inc. v. Northeastern Culverty Corp., 559 A.2d 1068 (Vt. 1989).

[18] 326 U.S. 501 (1946).

[19] *See, e.g.,* State v. Schmid, 423 A.2d 615 (N.J. 1980); New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994).

limited access.[20] There are also rights of tenants to receive visitors on private property, even if the owner of the property does not want the visitors.[21] In a few other ways the common law promotes access to private property. First, by easements by prescription, which allow the public to use property is they have used it for an extended period of time. Second, easements by implied by prior use, estoppel or necessity give a limited right of access over private property to reach landlocked parcels.

At the bottom of all of these restrictions are principles of reasonableness–reasonableness of regulations and of reasonableness of use. Those reasonable regulations are based on the principle that, at least after the United States Supreme Court's decision in *South Carolina Coastal Commission*, the regulations will be subject to special scrutiny if they are imposed after the acquisition of an interest in the regulated property. *Lucas* struck down South Carolina legislation that prohibited development along a coastal front. South Carolina defended the regulations with the claim that building would be hazardous to the property owners, as well as damaging to the public beaches. It analogized the regulations to common law prohibition of nuisance. The

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[20] Mathews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

[21] *See* State v. Shack, 277 A.2d 369 (N.J. 1971). One might argue that the right of tenant farmers to their lawyers and physicians is best phrased as part of the common law on the right of tenants to reasonable visitors. Nevertheless, the New Jersey Supreme Court phrased the right as part of a human rights limitation on the right to exclude. *Id.* ("Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."). Perhaps such a formulation is necessary to avoid a farmer making the right to exclude visitors an explicit part of the tenancy. One might be tempted to speak of New Jersey's anti-feudal jurisprudence. *Cf.* Joan Williams, *The Rhetoric of Property,* 83 IOWA LAW REVIEW 277 (1998).

common law of nuisance did not, however, extend so far.[22] And the court was unwilling to elide the gap between common law nuisance and regulation of noxious uses, as it has in 1911 in *Hadacheck v. Sebastian*.[23]

Lucas permits regulations of property–even if they deprive an owner of all economically viable uses–if they "do no more than duplicate the result . . . under the State's law of private nuisance, or by the States under its complementary power to abate nuisances." The court looked to background principles of state law to determine whether there was a property interest that the state was regulating, or whether (at the time the regulation was imposed) the owner's property was already subject to regulation.[24]

Still–and unsurprisingly–a dominant theme in American property is that the right to exclude is"one of the most essential sticks in the bundle of rights that are commonly characterized

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[22] *See* Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

[23] *See* 239 U.S. 394 (1915) (analogizing regulation of brick yard to common law nuisance, without finding such nuisance).

[24] The Supreme Court has recently struck down Rhode Island legislation that restrict a developer's use of property, even though it bought the property knowing that there were restrictions on building there. Kelo v. New London, __ U.S. __ (June 23, 2005), while of great importance to contemporary politics, has little application to the analysis here. For the right to cross(at to the cemetery's land) is based on an implied reservation. Therefore, there is no taking, even though there is physical occupation of property. *See* Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (noting that "the Takings Clause requires compensation of the government authorizes a compelled physical invasion of property").

as property."[25] Many commentators emphasize the right to exclude as well.[26] So we hear about the restriction of Native Americans to access land owned by their ancestors, for instance. What is surprising about graveyard access is how little we hear about this ancient right, which has for generations limited the right of property owners to exclude, or, phrased more positively, gave some members of the public a right of access. In fact, other than a few minor mentions in legal encyclopedias, the right has received virtually no commentary.[27]

II. The Graveyard Rights

> 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 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. The 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. We do but express the concurrence in this sentiment which we feel, when we hold that a church and burial ground situated as these now under consideration, and owned by distinct religious societies as tenants in common, are not within the spirit and meaning of our statutes of partition, and that the Court were right in denying judgment *quod partitio fiat* to the plaintiffs.
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> *Brown v. Lutheran Church*, 23 Pa. 495 (1854) (denying partition of cemetery by sale)

Given the significance of graveyards to Americans' hearts, they receive special protection

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[25] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[26] *See, e.g.,* Richard Epstein, *Rights and "Rights Talk*, 105 HARV. L. REV. 1106 (1992); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEBRASKA LAW REVIEW 730 (1998).

[27] *See Cemeteries*, 14 AM. JUR.2d 547, 589-591 (2000) (discussing rights of access and observing that "Persons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at seasonable times and in a reasonable manner."). *Cf. Cemeteries*, 14 C.J.S.2d 2, 20 (1991) (noting in passing the right to access lots that have been purchased).

in law in several ways. First, there is an implied easement across surrounding land to access the graveyard. Closely allied to the first right is a second, the restriction on desecration of graves. There is also right to bury relatives in the property. Fourth, there are restrictions on the right of the owner of the graveyard to sell or mortgage the property or use it in ways inconsistent with cemetery purposes.

A. **The Right of Access**

The most important of the graveyard rights is the right of access. Some states define the right by statute; others by case law. At base the right is an implied easement in gross to cross private property to access the cemetery. The easement is held by the relatives of the person buried in the cemetery and it descends by operation of law, but is not devisable nor alienable.

1. *Naming and Identifying the Scope of the Right*

The right arises most frequently when a person is buried on property owned by the family of the deceased. The property is then sold and there arises an implied reservation of the right to visit the cemetery. There could, of course, be an express reservation of an easement for access. But frequently the sellers fail to provide for an express reservation.

So courts employ several fictions to deal with the lack of explicit reservation of an easement to access cemeteries on private property. The first is that the owners of the cemetery impliedly granted an easement to the family members by virtue of permitting the burial. Sometimes courts link the implied grant to a dedication of the property to cemetery purposes.[28]

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[28] *See, e.g.,* Eggerson v. Ancar, 6 Teiss. 417 (La.App.Orleans 1909) ("No particular form of deed was necessary for such a dedication. We do not think that any deed at all was necessary. The mere fact of setting aside the land as a graveyard and permitting its use for burial purposes was in our opinion sufficient to constitute a valid dedication. Nor was it necessary that the dedication be registered. Dedications to public use, and servitudes in favor of the public, are not

That grant is enforced as an implied promise, through estoppel, although courts rarely discuss estoppel.[29] In the unlikely case that the original owner still owns the property, the implication of an easement to access the cemetery is relatively straight-forward. In most cases, however, the property containing the cemetery has been sold. Sometimes it has been sold in pieces, so that family member must cross property owned by several people to reach the cemetery. So courts employ a second implication: that there was an implied reservation of the easement by the cemetery's first owner in favor of the family members of the person buried in the cemetery.[30]

The right of access also arises when a deceased is buried in a cemetery not owned by the deceased's family. In that case, there is a two-step process. The easement for access is impliedly

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regulated by the strict rules which govern private property and transactions between individuals. The visible signs of such dedication and open use of the property by the public afford ample notice and protection to all, and supply the place of both title and registry.").

[29] *See* Roundtree v. Hutchinson, 107 P. 345, 345 (Wash. 1910) (finding cemetery access by estoppel).

[30] This is what the *Restatement (Third) of Property* calls a servitude implied from prior use. *See* § 2.11, § 2.12. Easements are typically impliedly reserved when there is a previous, apparent use of the easement and there is a reasonable necessity for the easement. *See generally* RESTATEMENT OF PROPERTY § 476 (1944) (listing eight factors for use in determining intention to impliedly reserve easement).

There is a second way of thinking about the easement by implication when the property is sold. When the cemetery is sold, there is an easement implied by necessity, because there is no way of accessing the cemetery other than over the land that has been sold. Because the standard for easements by necessity (that there is *no other* means of access at the time of sale) than of easements impliedly reserved, the later is most likely the best way of analyzing the right of graveyard access.

Easements by implied reservation are well-known in property. *See*, *e.g.*, Granite Properties Limited Partnership v. Manns, 512 N.E.2d 1230 (Ill. 1987); Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938).

granted by the landowner to the family members of the deceased.[31] Then, if the landowner sells, there is again an implied reservation by the seller in favor of the family members.[32]

Sometimes there could be a right of access even over property that was never owned by the same person as owned the cemetery. That is a more complex conceptually; it seems to arise when the cemetery is landlocked. For example, Missouri provides by statute for a right of access across any privately owned land to access a cemetery.[33] There are no cases testing the limits of the right of access in Missouri, so it is difficult to know whether a court would imply an easement across property never owned by the owner of the land where the cemetery is located.

Approximately eleven states, almost all in the south and areas settled by southerners, provide by statute for a right of access by relatives of people buried on private property. The

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[31] *See, e.g.,* Bessemer Land & Imp. Co. v. Jenkins, 18 South. 565 (Ala. 1895) ("[T]he proofs . . . tend to show a dedication, that the dead of the community, including plaintiff's child, were buried in the cemetery with the knowledge, consent, and license of defendant, and that the plaintiff, and the public generally, were encouraged to bury their dead there. If this was true, the defendant would be estopped to deny plaintiff's rights to and possession of the spot of land for the purpose used, and it could not therefore, any more than a stranger, unlawfully interfere with or desecrate it.").

[32] *See, e.g.,* Phinizy v. Gardner, 125 S.E. 195, 196 (Ga. 1924) (upholding explicit reservation of access to carriage road, which purchasers had notice was used to access cemetery, which provided: "That the piece of ground now appropriated as a family burying ground, together with an acre of land adjoining, to be laid off by my executors, shall be reserved for the purposes of a graveyard only, and that a right of way from the Savannah road be always reserved over the intervening land for the passage of funerals.").

[33] Missouri Statutes § 214.132 (1997):

> Any person who wished to visit an abandoned family cemetery or private burying ground which is completely surrounded by privately owned land, for which no public ingress or egress is available, shall have the right to reasonable ingress or egress for the purpose of visiting such cemetery. This right of access to such cemeteries extends only to visitation during reasonable hours and only for purposes usually associated with cemetery visits.

statutes typically imply an easement for access. The most detailed statutory scheme is provided by Virginia, which gives family members and descendants, cemetery plot owners, and geneological researchers a right of access across property where graves are located, to visit and maintain the graves. The right is limited to reasonable visitation and maintenance; motorized vehicles are not permitted, unless roads are already on the property.[34] (West Virginia's statute,

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[34] Va. Code Ann.§ 57.27.1 (1993):

A. Owners of private property on which a cemetery or graves are located shall have a duty to allow ingress and egress to the cemetery or graves by (i) family members and descendants of deceased persons buried there; (ii) any cemetery plot owner; (iii) any person engaging in genealogy research, who has given reasonable notice to the owner of record or to the occupant of the property or both. The landowner may designate the frequency of access, hours and duration of the access and the access route if no traditional access route is obviously visible by view of the property. The landowner, in the absence of gross negligence or willful misconduct, shall be immune from liability in any civil suit, claim, action, or cause of action arising out of the access granted pursuant to this section.

B. The right of ingress and egress granted to persons specified in subsection A shall be reasonable and limited to the purposes of visiting graves, maintaining the gravesite or cemetery, or conducting genealogy research. The right of ingress and egress shall not be construed to provide a right to operate motor vehicles on the property for accessing a cemetery or gravesite unless there is a road or adequate right-of-way that permits access by motor vehicle and the owner has given written permission to use the road or right-of-way of necessity.

C. Any person entering onto private property to access a gravesite or cemetery shall be responsible for conducting himself in a manner that does not damage the private lands, the cemetery or gravesites and shall be liable to the owner of the property for any damage caused as a result of his access.

D. Any person denied reasonable access under the provisions of this section may bring an action in the circuit court where the property is located to enjoin the owner of the property from denying the person reasonable ingress and egress to the cemetery or gravesite. In granting such relief, the court may set the frequency of access, hours and duration of the access.

E. The provisions of this section shall not apply to any deed or other written instrument that creates or reserves a cemetery or gravesite on private property.

which is almost identical to Virginia's also recognizes a right of access by friends.)[35]

Several other states offer a specific court procedure to obtain a permit for access to a cemetery. North Carolina provides that descendants of a deceased buried in a cemetery, as well as other people with a "special interest," may petition the superior court for an order to allow visitation and maintenance of the cemetery.[36] As with Missouri, the statute contemplates the right to cross property to access a cemetery, even if the cemetery is not located on that owner's property. Thus, one might use the statute to cross the land of several different owners. That means that the statute is not entirely a codification of common law implied reservation. For implied reservation would allow an easement only across property that was owned by the owner of the cemetery at the time of interment. Then, as parcels were sold off, there would be an implied reservation of the right to cross them to access the cemetery. But in the case of the North Carolina statute, the right is broader. It allows access across other parcels. Vermont has a similar

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[35] W. Va. Code § 37-13A-1 (2000).

[36] North Carolina has two provisions that work in tandem. One provision allows descendants, their designees, and other people with a special interest to enter property to "discover, restore, maintain, or visit a private grave or abandoned public cemetery" if they obtain permission of the landowner. If, however, the landowner does not give permission, then those people may petition the court "for an order allowing the petitioner to enter the property to discover, restore, maintain, or visit the grave or abandoned public cemetery."

The court shall grant access if:
(1) There are reasonable grounds to believe that the grave or abandoned public cemetery is located on the property or that it is reasonably necessary to enter or cross the landowner's property to reach the grave or abandoned public cemetery.
(2) The petitioner, or his designee, is a descendant of the deceased, or that the petitioner has a special interest in the grave or abandoned public cemetery.
(3) The entry on the property would not unreasonably interfere with the enjoyment of the property by the landowner.

The court's order may dictate a particular route to take to access the cemetery and also specify the times for visitation.

statute.[37]

The Texas statute provides a similar right of access across parcels other than those where the cemetery is located:

> Any person who wishes to visit a cemetery or private burial grounds from which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds. This right of access extends to visitation during reasonable hours and only for purposes usually associated with cemetery visits.

But in 1999 in *Meek v. Smith*, the Texas Court of Civil Appeals has held that the right of access across property that does not abut the cemetery is an unconstitutional taking.[38] The facts in *Meek* are a little bit ambiguous, but it appears that the plaintiffs sought access to the Coley Creek Cemetery over adjacent property owned by Everitt and Donna Meek. The trial court rejected the plaintiffs' claim of easement by implication or by implied dedication, which would have been appropriate only if the Meeks' land and the cemetery had been owned jointly at the time of the interment. Thus the court in *Meek* faced only a narrow question: whether it is constitutionally permissible to provide an easement over neighboring land to visit a cemetery. Surprisingly, the court did not discuss such critical cases as *Loretto*, nor did it discuss the common law right to visit cemeteries. The court interpreted the statute as though it created additional rights and found those rights to cross others' property to arrive at the cemetery an unconstitutional taking.[39] The holding in *Meek* does not implicate statutes that provide access to the cemetery itself, or even to

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[37] 18 V.S.A. § 5322 (1993).

[38] Meek v. Smith, 7 S.W.3d 297 (Tx. Ct. App. 1999).

[39] *Id.* at 301-02.

land once owned jointly with the cemetery. A more recent case has limited *Meek* and reaffirmed the common law right of access across the cemetery's land and land once owned by the cemetery.[40]

Perhaps the most straight-forward enumeration of rights comes from Florida's statute, which provides for an easement for reasonable access to visit and maintain the cemetery.[41] Florida, thus, deals directly with the key issue in cemetery access: the conflict between absolute exclusion and reasonable accommodation. Now that we see the limited success of reasonableness of accommodation over the absolute of the right of exclusion, we may be tempted to apply it in

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[40] *See Davis v. May*, 135 S.W. 3d 747 (Tx. Ct. App. 2003) (finding easement to cross land that adjoins cemetery and denying unconstitutional taking). The *Davis* court emphases that the property to be crossed is adjacent to the cemetery (which was not the case in *Meek*). *Id.* at 749. What is somewhat confusing, however, is how the statute could be constitutionally permissible if it provides the right to cross property that was not, at the time of the creation of the cemetery, owned by the same entity as owned the cemetery. The court finds a common law right in ingress and egress, though that right is based on an implied reservation at the time of creation of the cemetery. Thus, one wonders about the effect of the statute, because, as the *Davis* court acknowledges, the Tennessee Supreme Court's 1911 decision in *Hine v. State*, 149 S.W. 1058 (Tenn. 1911) established the basic implied dedication. And Texas adopted that decision long ago. *See* Houston Oil Co. of Texas v. Williams, 57 S.W.2d 380, 385 (Tex. Civ. App.– Texarkana, 1933).

For further analysis of the takings implications of prohibitions on desecration of native graves, see 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 (2000).

[41] F.S.A. § 704.08 provides:

The relatives and descendants of any person buried in a cemetery shall have an easement for ingress and egress for the purpose of visiting the cemetery at reasonable times and in a reasonable manner. The owner of the land may designate the easement. If the cemetery is abandoned or otherwise not being maintained, such relatives and descendants may request the owner to provide for reasonable maintenance of the cemetery, and, if the owner refuses or fails to maintain the cemetery, the relatives and descendants shall have the right to maintain the cemetery.

The statute is interpreted in Mallock v. Southern Memorial Park, Inc., 561 So.2d 330, 332 (Fla. 1990).

other areas. In fact, reasonableness is frequently a part of property law.[42]

The most limited rights are created by Indiana's statute. It grants a right to access cemetery land one day each year.[43] The question is one of easonable use, as an exception to the standard right of absolute exclusion.

Arkansas has a complex and unique statutory scheme, which provides for the conversion of private cemeteries to public ones. The conversion is based on a the idea of adverse possession. The statute sets the standard for adverse possession as use as a cemetery for fifty years.[44] The conversion to a public cemetery allows the county court to appoint public or non-profit bodies to care for public cemeteries; however, the statutory scheme makes no provision access. It is, rather, concerned with care. Presumably, there is an implied right of access for public cemeteries.

Arizona prohibits the sale of property that would leave a cemetery landlocked. The result of that statute is to provide by law for an implied easement.[45] In Arizona, a statute provides that a landlocked cemetery may not be sold.

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[42] *See supra* note 11 – 14 (discussing nuisance). One might also think reasonableness as an explanatory factor in such areas as regulatory takings, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), zoning, *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1922), mitigation of damages in leases, Somer v. Kridel, 378 A.2d 767 (N.J. 1977), termination of servitudes, El Di, Inc. v. Town of Bethany Beach, 477 A.2d 1066 (Del. 1984), and *cy pres*, In re Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990).

[43] I.C. § 6-1.1-6.8-15 (2001) ("The owner of land that is classified under this chapter as cemetery land must allow family members and descendants of persons buried in the cemetery to have at least one (1) day each year to gain access to and visit the cemetery. The date of the visit to the cemetery must be agreed upon between the owner and the family members and descendants of persons buried in the cemetery.").

[44] A.C.A. § 18-15-1408 (1997).

[45] A.R.S. § 32-2194.12 (2002) Permanent access to cemetery land ("No cemetery may be sold without provision for permanent access.").

Oklahoma has two relevant statutes. One provides for establishment of streets and other ways of access to cemeteries. It is ambiguous, but presumably the statute authorizes the use of eminent domain to acquire the right of access. Another statute, of more modest scope but perhaps more use, provides for a right of access by relatives to abandoned cemeteries on private land.[46] In a puzzling concluding sentence, however, the statute maintains that "This section shall not be interpreted to allow the creation of an easement or claim of easement nor a right of ownership or claim of right of ownership to an abandoned cemetery."[47] That sentence is puzzling because the statute seems to provide for an easement. However, perhaps the sentence is meant only to make clear that there is no right other than the right of reasonable access "for purposes usually associated with cemetery visits" and that it creates no rights *beyond* that.[48]

2. *Identifying the Right of Access and Its Scope From Cases*

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[46] The statute provides:

> Any relative of the deceased who wishes to visit an abandoned cemetery which is completely surrounded by privately owned land, for which no public ingress or egress is available, shall have the right to reasonable ingress or egress for the purpose of visiting such cemetery. This right of access to such cemeteries extends only to visitation during reasonable hours and only for purposes usually associated with cemetery visits. For the purposes of this section, "abandoned cemetery" means any place where human skeletal remains are buried and which no body has been interred for at least twenty-five (25) years and where such site is readily identifiable as a cemetery by an inspection of the property. Any relative of the deceased who wishes to visit an abandoned cemetery shall make a good faith effort to notify the owners and tenants, if any, of said property prior to visiting the cemetery. This section shall not be interpreted to allow the creation of an easement or claim of easement nor a right of ownership or claim of right of ownership to an abandoned cemetery

8 Okla. St. Ann. § 187 (2003).

[47] 8 Okla. St. Ann. § 187.

[48] *Id.*

Many of the states that do not have statutes providing for access do have case law that permits access. That right is similar to the rights of access that are created by statute in places like Florida and Texas. It provides, in essence, that the relatives of those buried in "dedicated" cemeteries on private property have the right to access that property for reasonable visits to the grave. Several states have particularly well-developed case law, including Alabama, Kentucky, Missouri, and Pennsylvania. Some other states have case law from the late nineteenth and early twentieth century as well.[49]

The most recent comprehensive discussion of the right of access comes from the Texas Court of Appeals case *Davis v. May*, decided in 2003.[50] It interpreted the rights of Marsha May to visit the graves of her great-grandfather, James Riley Alexander, and a few other relatives. The Alexanders were buried in Alexanders' land, which was sold without any provision for access to the graves. Over time, after some intermediate conveyances, the property came into the hands of Emmit and Debra Davis. The Davises refused May access.

At trial, a jury concluded that May should have reasonable access, which the jury thought would be one four-hour visit per month. In affirming the judgment, the Texas Court of Appeals held that the property owner, by permitting the burials, took on the obligation of holding the

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[49] *See, e.g.,* Roundtree v. Hutchinson, 57 Wash. 414, 107 P. 345 (Wash. 1910) (explaining the implied dedication works as enforced through equitable estoppel); Morgan v. Collins School House, 133 So. 675 (Miss. 1931) (providing for right of access and burial for family members already buried on property once a landowner permits one member of the family to be buried). In several cases, the right of access is discussed in the context of moving cemeteries. *See* Lakin v. Ames, 64 Mass. 198 (Mass. 1852) (prohibiting removal of graves by arguing that descendants have the right to visit graves); Humphreys v. Bennett Oil Co., 197 So. 333 (La. 1940); *See also* Hines v. State, 149 S.W. 1058 (Tenn. 1911).

[50] 135 S.W.2d 747 (Tex. Ct. App. 2003).

property in trust for the family members of the people buried there. That included the obligation of allowing access and reasonable upkeep, and also permitting further limited burials.[51] *Davis* adopted the broad language of the 1911 Tennessee Supreme Court opinion in *Hines v. State* that subsequent purchasers of the cemetery take it subject to the implied easement for access and further burial: "The graves are there to be seen, and the purchaser is charged with notice of the fact that the particular lot has been dedicated to burial purposes, and of the rights of descendants and relative of those there buried."[52]

Cases in Alabama and Kentucky further establish the basis and scope of the right. For example, in the 1945 case *Scruggs v. Beason*, the Alabama Supreme Court interpreted the right of family members to cross private property to visit the Choat Graveyard, which was first established in 1868 and had approximately 120 graves.[53] There were two bases: an easement by prescription, for the family members had crossed the property continuously since the cemetery was first established. Moreover, there was an implied reservation when the land that was crossed was sold out from the land where the cemetery was located.[54] In short, well-established property principles were harnessed to permit the access.

A 1995 case from Kentucky, *Commonwealth of Kentucky, Department of Fish & Wildlife Resources v. Garner*, is the most recent statement of the scope of the right. Jacob Garner's great-grandmother and his cousin are buried in a small cemetery, of approximately 3/4 of an acre

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[51] *Id*. at 750.

[52] *Id.* at 751 (quoting Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911)).

[53] 20 So.2d 774 (Ala. 1945).

[54] *Id*. at 777.

that contained approximately a dozen graves. The cemetery is located in a wildlife management area, owned by the federal government and managed by the state of Kentucky. And in order prevent vandalism and maintain control over the area, the state put up three gates, which were locked during the winter. The court balanced Garner's right of access, which at points he exercised through self-help by breaking the gates, against the state's interest in maintaining security.[55] It observed that "the owners of the easement and the servient estate have correlative rights and duties which neither may unreasonably exercise to the injury of the other." The court found it a reasonable balance between access and control to allow the state to provide keys to the three gates to Garner and his family members, so that they would have access whenever they would like, but the public would still be excluded.

So there are several key steps. First, a determination that the landowner initially consented to the burial on her land, what some courts refer to as dedication. The standard for dedication appears to be quite limited, perhaps as little as a showing that there was some acknowledgment that people were openly buried in the cemetery.[56] A headstone seems to be sufficient; and less may be sufficient. Second, a determination that the cemetery has is not

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[55] 896 S.W.2d 10, 12 (1995).

[56] One case has a somewhat higher standard for dedication: consecration by a priest. *See* McEnery v. Pargoud 10 La.Ann. 497 (La. 1855) ("In countries where the Catholic religion prevails as the religion of the State, grounds, like cemeteries, become sacred and inalienable after being blessed by the priestly power. . . . The evidence shows that a part of the ground in question was first used as a place of burial under the Spanish provincial government, about the year 1794. No concession of the land was ever made. The inhabitants intended to build a church there, but never consumated their intention. A small portion of it, by a sort of common consent, was enclosed with pickets by the inhabitants, and used as a cemetery for a short period, say from 1794 to 1800. It does not appear whether it was ever consecrated. Its use was then abandoned, another spot having been selected for a grave yard which was thought to be more convenient.").

abandoned and that there is still some connection between the people buried and those seeking access. The standard for abandonment is somewhat higher than dedication. For there has to be some continuing use of the cemetery or at least some continuing recognition that bodies are buried there.[57] But here if the cemetery is abandoned and not being maintained, it is likely that courts will allow access by family members so that people who are most interested can conduct care and maintenance. Such rights are explicitly contemplated by the Florida legislation. And, while cases on access are few, it seems as though access is likely and reasonable in such situations.

Finally, there is relatively little discussion of the connections between those buried and those seeking access. No case articulates a requirement that those seeking access actually knew the people they are visiting. But it is possible that people who are no longer able to trace a specific connection may have no right greater than that of other members of the public.[58]

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[57] When there has been no interment for decades, there may be abandonment. *See* Harris v. Borough of Fair Haven, 721 A.2d 758 (Ch. Div. 1998) (refusing to intervene to stop zoning variance that would allow building over an African American cemetery where there had been no interrments in more than 100 years).

One court overturned an injunction protecting a cemetery from sale, because the cemetery had been abandoned. The New Jersey Chancery Court issued an opinion supporting an extreme version of the rights of heirs in *Van Buskirk v. Standard Oil Co. of New Jersey*, 121 A. 450 (N.J.Ch. 1923), based on the

> Equity will grant relief in a proper case, at the suit of relatives, or even friends, whether owners of the soil of the cemetery or not, of those buried therein, because a dead body is in the custody of the law and the disturbance of its resting place and its removal is subject to the control and direction of this court.

But that injunction was overturned because the cemetery had been abandoned, as shown by the removal of bodies. *See* Van Buskirk v. Standard Oil Co., 134 A. 676 (N.J.Err. & App., 1926).

[58] One might draw some inference from a case upholding a judgement for negligent grave desecration. That case allowed a great-grandchild to sue, observing that he knew the decedent whose grave was desecrated. *See* Rhodes Mutual Ins. Co. v. Moore, 586 So.2d 866 (Ala. 1991).

B. Corollary Rights: Rights Regarding Desecration Burial, and Sale

1. *Rights Against Desecration*

> If relatives of blood may not defend the graves of their departed, who may? Always the human heart has rebelled against the invasion of the cemetery precincts; always has the human mind contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world. When the patriarch Jacob was dying in Egypt, he spake unto the Israelites, and said: "I am to be gathered unto my people; bury me with my fathers in the cave that is in the field of Ephron, the Hittite, in the cave that is in the field of Machpelah, which is before Mamre, in the land of Canaan, which Abraham bought with the field of Ephron, the Hittite, for a possession of a burying place. There they buried Abraham and Sarah, his wife; there they buried Isaac and Rebekah, his wife; and there I buried Leah." Gen. xlix, 29. Jacob regarded the grave as the never-ending resting place of his kindred. Ever since those distant days so has felt the human heart. Everything else has changed; but that sentiment remains steadfast to-day. . . .
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> Ritter v. Couch, 76 S.E. 428 (W.Va. 1912).

A critical right, closely allied to the right of access to an ancestor's grave, is the right against desecration. For if the owner of land where a cemetery is located were allowed to destroy the cemetery, then there is little left of the right to visit a grave that no longer exists. The right of access in family members works in conjunction with the limitation on landowners' right to use cemetery property.[59]

Most states have statutes prohibiting the desecration of cemeteries and well-developed case law providing for causes of action by family members against those who destroy graves, even if the graves are on their own property. This is another part of the affirmative easement that

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The standard for suing for damages for desecration is not necessarily the same as those who have the more limited right to visit the grave of ancestors (or sue for injunctive relief against desecration), nor should it be.

[59] This is more in the nature of a bright line rule against desecration, which is in contrast to the reasonableness rule of access.

exists on cemeteries.

a. *Common Scenarios of Desecration*[60]

The impetus to development, as well as spirits of vandalism, have led to grave desecration. Many states make desecration a crime.[61] Typically it is a crime to remove human remains, [62] as well as to disturb the grave itself[63] or the monuments around it.[64]

In addition to criminal sanctions, desecration is a tort. It happens frequently when new owners are building on the property, as well as when they are farming. In *Polhemus v. Daly*, for example, the owner of the property used the cemetery as a sod farm. The owner used a horse-

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[60] *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

[61] *See, e.g.*, Alabama Code 13A-7-23.1.

[62] A typical statute is "Unauthorized Removal of Human Remains,"13 V.S.A. § 3761:
> A person who, not being authorized by law, intentionally excavates, disinters, removes or carries away a human body, or the remains thereof, interred or entombed in this state, or intentionally excavates, disinters, removes or carries away an object interred or entombed with a human body in this state, or knowingly aids in such excavation, disinterment, removal or carrying away, or is accessory thereto, shall be imprisoned not more than fifteen years or fined not more than $10,000.00, or both.

See also Steve Cusick, *Giving the Abenaki Dead Their Due: A Proposal to Protect Native American Burial Sites in Vermont*, 28 VT. L. REV. 467, 479 (2004).

[63] *See also* Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 Colum. J. Envtl. L. 1 (2002) (lamenting inadequate protections for native graves in New York).

[64] *See, e.g.*, Desecration of Venerated Objects, C.R.S.A. § 18-9-113 (defining desecration of a place for "burial of human remains" as "defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result."); Mass. G.L.A. 266 § 127A (providing for up to five years' imprisonment for "[w]hoever willfully, intentionally and without right, or wantonly and without cause, destroys, defaces, mars, or injures a . . . place used for the purpose of burial or memorializing the dead").

drawn sled to remove sod, which obliterated the identity of the graves.[65] Such act constituted a desecration to all the graves, and defendant was therefore enjoined. The farmer was enjoined. Similarly, in *Cochran v. Hill* the Texas Court of Appeals enjoined the owner from pasturing live stock and from drilling oil wells in the cemetery.[66] Grave robbing is one particularly heinous

b. *Rights to Stop Desecration*

Grave desecration is subject to criminal punishment, as well as civil liability. Thus, there is a public right to protect against desecration and a private right. The private right is important because it authorizes relatives of the buried individual to protect the grave. That right puts the power of protection into the hands of the people most interested in it; the right also works to protect the right of access, for it gives those people who have the right of access the power to protect the grave.

Typically courts allow suit by family members and descendants of the people buried when cemeteries are disturbed through leveling or disruption of graves, removal or destruction of monuments, such as headstones, and removal of gates or other markers.[67] The key elements are knowing disruption of a grave.[68] Relatives and descendants are permitted a full range of relief, from money damages to injunctions. One of the most recent cases to interpret the action of

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[65] 296 S.W. 442 (Mo.App.).

[66] 255 S.W. 768 (Tex.Civ.App.).

[67] *See, e.g.,* Michels v. Crouch, 150 S.W. 2d 111 (Tex. Civ. App. 1941) (plowing in cemetery and damaging headstone); North East Coal Co. v. Pickelsimer, 253 68 S.W.2d 760 (Ky. 1934) (mining in vicinity of cemetery, which disrupted access to cemetery and soil near cemetery).

[68] *See, e.g.,* Johnson v. Virginia-Kentucky Stone Co., 149 S.W.2d 496 (Ky. 1941) (holding construction contractor not liable because the disruption was done without knowledge that there was a grave).

desecration is *Rhodes Mutual Insurance Company v. Moore*, which permitted recovery by a remote descendants of deceased.[69] *Rhodes* illustrates the generally expansive view of the right to prevent for desecration and to recover for it when it occurs.

In 1987 in *Whitt v. Hulsey* upheld a jury award of punitive damages for grave desecration for a cemetery that had been established in 1853. When a new owner purchased the property containing the cemetery in 1983, he removed headstones.[70] *Whitt* provides for a private cause of action for those who destroy a cemetery, as long as the cemetery is still identifiable. There are statutory provisions for relocating cemeteries, which frequently require a court's approval for relocation.[71] Landowners who unilaterally remove headstones or bodies are liable to have punitive damage awards levied against them. This is a necessary right to preserve the cemetery, so that there is a cemetery to visit. This is much better known as the right of access.

2. Right of Burial

> A vault, in reference to interment, is but a place to entomb; and when so used, becomes a tomb; a receptacle for the dead--a last resting place. A grant of such a place gives an exclusive right; and why may it not be perpetual? Abraham's purchase of the cave in the field of Machpelah, "for a possession of a burying-place," was of that character. There, according to sacred history, the patriarch buried his wife Sarah, and was himself buried; there, were Isaac and Rebecca also laid; in that cave Jacob buried Leah, and while sojourning in Egypt and about to die, he made his son Joseph swear to him to remove his body and bury it with his fathers. Here we have an instance of a purchase, which enured to the purchaser and his heirs even to the fourth generation. It is certainly competent for a man, at this day, to buy the fee simple of an estate in land for the purposes of sepulture; and when converted to that use, the title may descend or be again the subject of sale.

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[69] *See* Rhodes Mutual Ins. Co. v. Moore, 586 So.2d 866 (Ala. 1991).

[70] 519 So.2d 910 (Ala. 1987).

[71] *See, e.g.,* Proceedings by Landowner for Removal of Remains From Abandoned Family Graveyard, Va. Code § 57.38.1.

Brick Presbyterian Church, 6 N.Y. Ch. Ann. 607 (1837).

Another right, closely allied to the right of access is that of further burial. Often the right of burial is acquired by purchase, as happens when a family purchases a series of plots in a cemetery.[72] Some courts also implied a right of further burial in a private cemetery once the cemetery owner has consented to some burials.

The right to mark a grave is appurtenant to the right of burial. For those who are entitled to bury a family member are allowed to place grave markers.[73] Problems arise, though, when there is a dispute between family members regarding how to mark a grave.

3. Restrictions on Sale of Cemeteries

There are also restrictions on the sale of public cemeteries (as opposed to cemeteries on private property that are the attention of the rest of this article). Those restrictions on sale are

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[72] The right even in those cases is most likely an easement. *See* Richards v. Northwest Protestant Dutch Church 20 How.Pr. 317 (N.Y.Sup. 1859) ("The right of *burial* in a lot, when confined to a *church yard,* as distinguished from a separate independent *cemetery,* although *conveyed* with the common formula of "heirs and assigns forever," must stand upon the same footing as the right of public worship in a particular *pew* of the consecrated edifice. It is an *easement* in, and not a title to, the freehold, and must be understood as granted and taken subject (with compensation of course,) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary.").

[73] *See* Durell v. Hayward, 75 Mass. 248 (1857) ("The indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long established usage of the community."). But at times courts seem to think (improperly, probably), that the property owner controls what monuments may be placed on graves. *See* Smiley v. Bartlett, 6 Ohio C.C. 234 (Ohio Cir.Ct. 1892) (in discussing equity court's right to intervene in disposition of a body, court comments the cemetery lot in which the body is now buried is the private property of the defendant, Matthew Bartlett, who may, at will, prevent the plaintiffs from approaching or decorating the grave of their mother).

related to the right of reburial, however. Thus, while a cemetery may be relocated when there is extraordinary need, there can be no sale of the public cemetery unless there are adequate provisions for the preservation of the cemetery. The Pennsylvania Supreme Court spoke to the restrictions on the sale of cemeteries in 1859:

> We hold that the ground once given for the interment of a body is appropriated for ever to that body. It is not only the *domus ultima,* but the *domus aeterna,* so far as eternal can be applied to man, or terrestrial things. Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed. We believe it our duty to restrain, by injunction, this congregation from selling, or encumbering by mortgage or judgment, so much of the hundred acres of land described in the bill as has been set apart for a grave-yard; and as the same might be insufficient in size for the purpose, or not specifically designated, we shall appoint a suitable artist to lay off the ground intended to be embraced by the decree. We also deem it improper to sell or encumber the church built on those premises. If encumbered, it may be sold to the great inconvenience of the worshippers, and contrary, as we believe, to the intention of the founders.[74]

III. Balancing Public Rights in Cemeteries

In some early cases from Louisiana, there is a strand of thinking that dedication of the cemetery converts it from private property into public property, which the community has the right to govern. For one case spoke of the early rights of the churches and the public in cemeteries:

> By the Spanish law, things established for the service of God were held sacred, and the dominion thereof was not in any person, and could not be counted as property. The laws on that subject were borrowed from paganism; but nevertheless, since the solemn consecration of churches and cemeteries was established, immediately on things being consecrated, religion was considered as occupying them, and being irrevocably inseparable from them. The consequences of this principle were regulated by the common law

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[74] Brendle v. German Reformed Congregation, 33 Pa. 415 (1859). *See also* Arkenburgh v. Wood 23 Barb. 360 (N.Y.Sup. 1856) (permitting sale so long as the cemetery continues as a church yard).

institutes of the law of Spain . . . .[75]

But that hint of radically different treatment of property rights in cemeteries was early rejected in Louisiana.[76] So there have been frequent conflicts between those whose relatives are buried in cemeteries and those who would like to use the cemetery property for another purpose. Thus, cemeteries have joined other conflicts that appear periodically over established uses of property (such as cemeteries or most recently houses) against other, perhaps more economically productive uses of property.[77]

Balanced against the right of burial and access is the right to remove bodies and thus move cemeteries. The removal is sometimes necessary; and while courts are reluctant to grant removal, they countenance them in rare cases. This is part of a vigorous debate over public versus private rights in land, which has stretched from the nineteenth century to the present.[78] The Pennsylvania Supreme Court phrased the conflict well in 1850 when it asked whether rights of the dead would outweigh the rights of the living to use property for railroad tracks?[79] It was an strand of the

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[75] *See* Xiques v. Bujac 7 La.Ann. 498 (La. 1852).

[76] *Id*. ("In 1803, the country embracing it was ceded to the United States, and in 1823, this land was confirmed to the parish of Ouachita by Congress, moved, it would seem, by a respect for the feelings and associations of the old inhabitants of the neighborhood. But the United States annexed no condition to its grant. The fee simple of the land passed absolutely to the parish, and it must thenceforward be considered as under the dominion of the laws of Louisiana.").

[77] *See, e.g.,* Kelo v. City of New London, __ U.S. __ (2005).

[78] *See, e.g.,* WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (discussing conflicts over right to use property for the public benefit as opposed to private uses); GREGORY ALEXANDER, PROPRIETY AND COMMODITY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997).

[79] Brocket v. Ohio & P.R.R. Co. 14 Pa. 241 (1850).

classic debate over control of property by the dead (and their relatives) or by the living.[80] The problem in cemeteries, however, is not just that people who are now dead are occupying the property. For the preservation of the cemeteries is largely about the preservation of a place for people who are alive to visist, remember, and worship their ancestors and relatives. Thus, cemeteries pose a conflict between the rights of the living to have a place of memorial for the dead and the rights of other living people to use the land in (what to them) is a more productive fashion. Yet, frequently, it is spoken about as a conflict between dead and living. The Pennsylvania Supreme Court phrased the conflict as one between the abodes of the dead and the needs of the living:

> The abodes of the living are not more inviolable than the abodes of the dead; yet thousands of human bones lie beneath the walks and alleys of Washington Square in Philadelphia, once its Potter's Field, now its most frequented pleasure-ground. If a cemetery cannot impede the march of improvement for purposes of recreation, how can the owner of a cottage expect that it will impede a work of necessity? The legislation of a country necessarily takes its tone from the temper and the necessities of the age. A house, a church, a grave-yard, or any thing else, may be conveniently privileged in an act to incorporate a turnpike or a canal company, because it may be avoided without lessening the usefulness of the work; but every deflexion from a right line in the bed of a railroad, is proportionately productive of danger to property and life. It is indispensable to safety and speed that the route of it be as direct as the surface of the country will permit; but they could not be attained in a settled country if every hovel or house were privileged; and thus a *quasi* national work, intended for posterity, might be botched through a respect for the sacredness of temporary erections. The course of a railroad might be insuperably obstructed by the obstinacy of a proprietor in the gorge of a mountain, or the pass be made, at least, difficult and dangerous. A mangled passenger, inquiring the reason of a deflexion, when the cause of it had disappeared, might be told of our infinite respect for property at the expense of safety; but the information would neither ease his pain nor set

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[80] *See, e.g.,* ALEXANDER, *supra* note 78, at . *See also* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (discussing conflicts over control of property by vested interests or newer users).

his leg.[81]

The New York Supreme Court, similarly, rejected a claim that the state could not take a cemetery so that it might convert it into a street. That right of relocation exists as part of the city's power of eminent domain.[82]

In fact, the New York Chancery Court dealt with that conflict between the rights of the dead and those of the living in 1837 when it rejected an effort to prevent the sale of the Brick Presbyterian Church in Manhattan for use as a street. Already the city had encroached on the church and made the cemetery an improper place for burial. The court quoted Sir Walter Scott's opinion in *Gilbert v. Buzzard*, which had rejected the right to bury people in iron caskets. Such caskets would have prolonged the period of time necessary for bodies to decompose (and thus dramatically extended the amount of space need for cemeteries):

> This is the known progress of things in their ordinary course; and if to this is to be added the general introduction of a new mode of interment, which is to insure to the bodies a much longer possession, the evil will be intolerable. A comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis must be surrounded by a circumvallation of church-yards, perpetually enlarging, by becoming themselves surcharged with bodies; if indeed landowners can be found willing to divert their ground from the beneficial uses of the living to the barren preservation of the dead, contrary to the humane maxim quoted by Tully from Plato's Republic, 'Quae terra fruges ferre, et, ut mater, cibos suppeditare, possit, eam nequis nobis minuat neve vivus

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[81] *Brockett*, 14 Pa. at 241.

[82] *See* In re Opening of Albany St. 6 Abb.Pr. 273 (N.Y.Sup. 1858) ("The remaining objections made to the granting of this motion rest entirely upon the merits of the opening, and should have been presented to the Common Council, and not to the court. Even if, as suggested by the counsel for Trinity Church, the opening of this street is against the law of nature and the divine law, because it is an interference with a public cemetery,--if it be demoralizing to permit a burying ground to be disturbed, if compensation cannot be made for the dead, whose bodies are to be removed; still none of those reasons are properly addressed to this court at this time."). But sometimes that right is limited by statute.

neve mortuus."[83]

Perhaps in relation to the Christian belief in the bodily resurrection of the dead, Scott implied that the right may be subject to a limitation for the period during which the bodies are intact.

Cities can relocate cemeteries, as part of their police power and under their eminent domain power. Thus, in recent years, the relocation of cemeteries by government bodies has occasioned little litigation. However, there are more conflicts over landowners who wish to relocate cemeteries from their property, so that they can build on the property.[84] Private relocation of cemeteries is governed by statute. It typically involves petitioning the local court for permission. The property owner typically must show that there are reasonable plans for relocation and that the cemetery is not currently in use.[85] In language discussing the rights of the living, the New York Supreme Court strictly limited rights of burial and visitation and even allowed the removal of headstones:

> The legal doctrine is, that "the common cemetery is not *res unius aetatis:* the exclusive property of one generation now departed, but it is the common property of the living, and of generations yet unborn, and subject only to the temporary appropriation (*Gilbert vs. Buzzard*, 3 Phillimore, 335). In the most enlarged construction that can be given to the plaintiff's legal rights, those rights must be considered as satisfied. The feelings, which still

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[83] 6 N.Y. Ch. at 607 (quoting *Gilbert v. Buzzard*, 3 Phil. Ecc. 335, 355.)

[84] Sometimes, the burial ground has the right to re-bury. *See*, *e.g.,* Windt v. German Reformed Church, 4 Sand.Ch. 471 (NY 1846) ("The complainants have relatives interred there, but no one of them has any deed of a vault or a portion of the ground, or any title thereto. No such deed or conveyance has been executed to any person. The whole title has remained in the corporation. The sepulture of friends and relatives, in such a burying ground, confers no title or right upon the survivors. If the latter have any interest in the cemetery, or control over its use and disposal, it can only be as corporators in the society owning the ground.").

[85] *See, e.g.,* Abandonment of Cemeteries and Removal and Reinterment of Human Remains, Ala. Code Section 11-47-62.

> prompt her to guard the soil with which the remains of her kindred have long since mingled, are natural and commendable. It is very manifest, from the facts before me, that the defendants have sedulously sought to guard against any unnecessary violation of those feelings. They seek to appropriate the land to the beneficial uses of the living. This it is their right, if not their duty to do. However painful it may be to the plaintiff to see the memorials which affection has erected in memory of her kindred removed, she has no legal right longer to divert the land to the barren preservation of those memorials.[86]

There were also questions whether the location of a cemetery would constitute a nuisance. In general, cemeteries were not by themselves nuisances.[87] In certain instances, there may be an injunction on burials where it would endanger public health.[88]

The only protection afforded to the remains of the dead interred in a cemetery of this description, is, by the public laws prohibiting their removal, except on the prescribed terms; and in a still stronger public opinion. Probably, these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvellous rapidity, and whose wants leave but little room for the remains of the dead, in the dense and crowded haunts

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[86] *See Schoonmaker v. Reformed Protestant Dutch Church of Kingston*, 5 How.Pr. 265 (N.Y. Sup. 1850).

[87] *See* Ellison v. Commissioners of Town of Washington 58 N.C. 57 N.C. 1859 ("Our conclusion is, that *burying the dead* in public cemeteries, is not necessarily a nuisance, but might become so by careless and improvident modes of interment. It is, at most, a doubtful or contingent nuisance, and in such cases, the courts of equity will not interfere to prevent, but will leave complainants to establish the nuisance by an action at law, when it shall arise."). The Louisiana Supreme Court acknowledged that cemeteries might injure property interests at any place and so refused to enjoin them. City of New Orleans v. Wardens of Church of St. Louis, 11 La.Ann. 244 La. 1856 ("It is very evident that, wherever located, the cemetery must be in the vicinity of private property, belonging to persons, who might be able to prove that the marketable value of their property is injuriously affected by such vicinity.").

[88] Clark v. Lawrence 59 N.C. 83 N.C. 1860 (permitting injunction where interrment would endanger public health).

and thoroughfares of the living."). Yet another volley in the on-going tribal war between property rights advocates–and those who wonder whether the key elements of nineteenth-century property were the protection of sentiments or cold reason.

It is critical that the cemetery retain its hallowed character. For, otherwise, the cemetery is liable to be moved.[89] And when the location of a cemetery is lost, the relatives of people buried there lose their special rights to protect the cemetery. They have no more rights than the general public, which means they have no rights.[90]

IV. The Meaning of the Right of Access

Pa said softly, "Grandpa buried his pa with his own hand, doine it in dignity, an' shaped the grave nice with his own shovel. That was a time when a man had the right to be buried by his own son an' a son had the right bury his own father."

"The law says it different now," said Uncle John.

"Sometimes the law can't be foller'd no way," said Pa. "Not in decency, anyways. They's lots a times you can't. When Floyd was loose an' goin' wild, law sai we got to give him up–an' nobody give him up. Sometimes a fella got to sift the law. I'm sayin' now I got the right to bury my own pa. Anbody got somepin to say?"

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[89] *See* Clarke v. Keating, 170 N.Y.S. 187 (N.Y.A.D. 2 Dept. 1918) (finding that burial rights granted by will in 1794 had been extinguished because the cemetery had been run-down and around 1907 the bodies in the cemetery had been moved to another cemetery):

> Even without precise precedent, land that has lost its sacred character should not be withheld from serving the needs of the community, through a mere sentiment regarding a site in which the higher uses have ceased. The Roman law hallowed, not only a cemetery, solum religiosum, but regarded a single lawful burial as a dedication of such a site to religious use. However, the strong practical sense of that civilization, favoring extinguishment of rights by nonuser, held cemeteries and single burial places as reserved from trade only while such burials remained. After disinterment and removal of the body or remains, the religious character of the ground ceased (desinit locus religiosus esse). Dig. XI, tit. 7, § 44.

[90] *See* Sanford v. Vinal, 552 N.E.2d 579, 581 (Mass. App. Ct. 1990).

Pa Joad in *The Grapes of Wrath*[91]

I offer we put a note of writing' in a bottle an' lay it with Grampa, tellin' who he is an' how he died, an' why he's buried here." . . . Tom sat down in the firelight. He squinted his eyes in concentration, and at last wrote slowly and carefully on the end paper in big clear letters: "This here is William James Joad, dyed of a stroke, old old man. His fokes bured him becaws they got no money to pay for funerals. Nobody kilt him. Just a stroke an he dyed.

Tom Joad, *The Grapes of Wrath*[92]

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[91] JOHN STEINBECK, THE GRAPES OF WRATH AND OTHER WRITINGS 357 (Lib. Am. ed., 1996). There is a 1932 Oklahoma case, which one seriously doubts that Steinbeck know about, that relieves a husband of expenses for burying his wife. *See* In re Wilson's Estate, 15 P.2d 825 (Okla. 1932). A dissenting justice quoted Genesis' story of Abraham purchasing a burial place for Sarah. The dissent observed that

> And Abraham said unto the sons of Heth, I am a stranger and a sojourner with you; give me a possession of a burying place. And the children of Heth answered, thou art a mighty prince among us; in the choice of our sepulchres bury thy dead. And Abraham replied that he wanted the cave of Machpelah which is in the end of his field for as much money as it is worth. And the Hittite answered, the field I give thee and the cave that is therein I give thee. And Abraham answered, I will give thee money for the field. take it of me, and I will bury my dead there. And Ephron answered, the land is worth four hundred shekels of silver; what is that betwixt me and thee? Therefore bury thy dead. And Abraham weighed to Ephron the silver, four hundred shekels of silver, current money with the merchant. And the field of Ephron and the cave which was therein and all the trees that were in the field, that were in all the borders round about, were made sure to *828 Abraham for a possession. And after this, Abraham buried Sarah his wife in the cave in the field in the land of Canaan. Here, from the earliest dawn of time, civilized men, to the present day, have felt it a moral and a legal duty to bury their wives as befits their station in life. . . . Abraham refused a free burial place for Sarah and insisted that he bear the expense of preparing the last resting place for his beloved companion.

Perhaps, Steinbeck did have the story of burial in Genesis in mind when the family left grandpa Joad in the desert.

The same story was used to conclude a lawyer's argument that a grant in 1712 for a town cemetery had extinguished all the grantors' rights in *Town of Chatham v. Brainerd*, 11 Conn. 60 (1835). After recounting the story of Abraham, the advocate observed that:

> The same feeling has been cherished among all civilized nations. And when we erect our memorials to perpetuate the recollection of the virtues of departed friends and relatives, we are solaced by the belief, that their bodies will rest undisturbed in their places of sepulture, until they are raised in glory.

[92] STEINBECK, THE GRAPES OF WRATH AND OTHER WRITINGS, *supra* note 91, at 358, 360.

The Joad's quiet civil disobedience–and Steinbeck's invocation of Pretty Boy Floyd–reminds one of the multiple ways in which the poor and dispossessed have dealt with legal institutions. Ralph Ellison, another of the great writers inspired by Oklahoma, also spoke of Pretty Boy Floyd and civil disobedience. He wondered, though, at the ways that white people protected Floyd, even while they harshly criticized black law breakers. Ellison saw a disparity in law between white and black. But he also advanced a faith in law.[93] In the ancient right of access to a graveyard and in the faith in law are joined two powerful concepts for remaking the

The ancient right of the cemetery has some magical power hidden within it–to rebalance the power of landowners and those whose ancestors are buried on that land. In the recent explosion of talk of the past, particularly of slavery and Jim Crow, and the understanding that comes along with that past, there is now the opportunity to harness one ancient right of the graveyard, to visit private property and to remember the past.

Cemeteries have a strong hold on the American, indeed the human, mind. From the description of sepulchers in the Bible through the great nineteenth century cemeteries at Gettysburg[94] and countless other places like Mount Auburn in Cambridge, Massachusetts,[95] there

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[93] *See* Ralph Ellison, *The Perspective of Literature*, in RALPH ELLISON, GOING TO THE TERRITORY 321, 324 (1986).

[94] GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1991).

[95] *An Address on the Dedication of the Cemetery at Mount Auburn, September 24, 1831*, 1 NEW ENGLAND MAGAZINE 539-42 (1831) (discussing Joseph Story's dedication oration). *See also Burial*, 93 N. AM. REV. 108 (1861); *The Grave in the Forest*, 4 SOUTHERN LITERARY MESSENGER 690-693 (1838); S.W.G. Benjamin, *Cemeteries*, 27 HARPER'S 331 (1863); *Earth Burial and Cremation*, 135 N. AM. REV. 266 (1882). *See also* KENNETH JACKSON & CAMILO VERGARA, SILENT CITIES: THE EVOLUTION OF THE AMERICAN CEMETERY; ROBERT POGUE

has been a reverence for the cities of the dead. Some sense of the judiciary's reverence comes from cases involving improper disposal of bodies:

> From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and inclosed as the cemeteries of the dead. Hence, before the late statute of *Massachusetts* was enacted, it was an offence at common law to dig up the bodies of those who had been buried, for the purpose of dissection. It is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased. If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners. If a dead body may be thrown into a river, it may be cast into a street:--if the body of a child--so, the body of an adult, male or female. Good morals--decency--our best feelings--the law of the land--all forbid such proceedings. It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to every thing connected with the tomb.
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> Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country;-- and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit.[96]

So the right of access has meaning for several reasons. First and perhaps most important is the central importance of the sentimental attachment to cemeteries. The cemetery has great meaning to individuals and, sometimes as in the case of Gettysburg and Arlington National Cemeteries, they have great meaning for us as a nation. Permitting access to those places of worship of ancestors is a little-noted but important right for the nation and for individuals, too. Visits to cemeteries remind us of the connections between the past and the present and the ways

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HARRISON, DOMINION OF THE DEAD (2003); DAVID CHARLES SLOANE, LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY (1991); ALLAN I. LUDWIG, GRAVEN IMAGES: NEW ENGLAND STONECARVING AND ITS SYMBOLS, 1650-1815 (1966).

[96] In re Kanavan, 1 Me. 226 (1821).

that we are dependent on the contributions made by people in the past. Cemeteries have great power to remind us of the contributions that have been made; they are often the sites of celebrations, even if sober, of the past and of our debts to the people buried in them.

The right of access also serves to rebalance the power between those who own cemeteries and those whose ancestors are buried there. Because that right of graveyard access existed at common law, the owners of property are not entitled to exclude or even to claim compensation for a taking. While we are hearing much these days about the debate about reparations for slavery and Jim Crow, there is an effort to find ways of reminding us about the past. Perhaps the most successful efforts to recall the past are the disclosure ordinances that require businesses to recount their connections to slavery. No one has yet spoken about slave cemeteries as a place for remembering the connections to the past, although cemeteries and monuments to the dead are important signifiers of our national identity.[97] Cemeteries, in short, remind us of the sacrifices made by people in the past and of both the burdens and promises of our history.[98] Nor has there

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[97] *There has been limited* discussion of slave cemeteries. *See, e.g., Burial Ground of Unkept Promises,* NEW YORK TIMES (October 6, 2002); Brent Staples, *Editorial Observer; History Lessons From the Slaves of New York,* NEW YORK TIMES (January 9, 2000).

[98] The role of monuments in national culture is an important and as yet inadequately explored area of scholarship. Sanford Levinson has made a very promising beginning with *Written in Stone: Public Monuments in Changing Societies* (1998); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). And a body of work is emerging on truth commissions and official apologies are creators of public memory. *See, e.g.,* Roy L. Brooks, *Getting Reparations for Slavery Right–A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251 (2004); Edward T. Linenthal, *The Contested Landscape of American Memorialization: Levinson's Written in Stone*, 25 LAW & SOC. INQUIRY 249 (2000). There has been little exploration yet about the role of judicial opinions as monuments to national memory, although in the nineteenth century judges sometimes spoke about precedent as monuments to guide them and later jurists. *See, e.g.,* In re Opinion of the Justices, 81 Mass. 599, 600 (1860) ("The enduring

been any talk of cemetery access, such as the descendants of slaves visiting the plantations where their ancestors labored, died, and are buried. Yet, that simple right has none of the problems of the statute of limitations that plague reparations lawsuits.[99] The Tennessee Supreme Court wrote in 1911 regarding access by descendants to a cemetery established around 1851 that the statute of limitations was not a bar to suit even those many years later:

> Nor is the right barred by the statute of limitations, so long as the lot is kept inclosed, or, if uninclosed, so long as the monuments and gravestones marking the graves are to be found there, or other attention is given to the graves, so long as to show and perpetuate the sacred object and purposes to which the land has been devoted. No possession of the living is required in such cases, and there can be no actual ouster or adverse possession, to put in operation the statue of limitations, so long as the dead are there buried, their grave are marked, and any acts are done tending to preserve their memory and mark their last resting place.[100]

Perhaps even less is necessary to preserve the right of access; perhaps as long as the graves are kept alive in the memories of the community and so long as they can be located, the easement may continue. There is, of course, the requirement that the slaves' descendants be related to the

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monuments of his judicial learning, his intellectual grasp, his sound judgment, and his unceasing labor, will be found in the published reports of the judicial decisions of this court.") (speaking of Chief Justice Lemuel Shaw). At other times, judges worried that the precedents were not yet certain. *See, e.g,* Hempstead v. Reed, 6 Conn. 480 (1827) (Peters, concurring) ("I cannot grope through a labyrinth of legal lore, not indeed endless, but 'lengthening as I go,' to find reasons for reversing our decision in *Smith v. Mead*, 3 Conn. Rep. 253., merely to dispose of a question hypothetically raised."). And even history failed in many cases to serve as an adequate monument. As Attorney General Randolph argued in *Chisholm v. Georgia*, 2 U.S. 419, 424 (1793): "A parade of deep research into the Amphyctionic Council, or the Achaean league, would be fruitless, from the dearth of historical monuments. With the best lights they would probably be found, not to be positively identical with our union."

[99] *See, e.g.,* Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1183-87 (2004) (discussing problems with statute of limitations); In re African-American Slave Descendants Litig., 304 F.Supp.2d 1027 (N.D. Ill. 2004).

[100] State v. Hines, 149 S.W. 1058, 1060 (Tenn. 1911).

people asserting the right of access.[101]

And so one may soon see the descendants of people enslaved on southern plantations returning to those plantations to visit the graves of their ancestors and to talk about the meaning of the graves for remembering the role of slavery in our past. Cemetery visits offer something more, though. This is a metaphor for the reuniting of black and white in our common past. The master and the slave were bound together, and while one there was an obscene disparity of power between them, the relationship bound both of them tightly and together. In a sense, they could not exist without the other; the right to visit burial grounds is a tangible manifestation of the fact that the white and black communities are inseparable; we are tied together by our common past, our common humanity, our common nationality, and our common future.[102] The exercise of the ancient right of the graveyard also offers the hope of recalling that common mission and of rebalancing the rights of slaves' descendants and plantation owners' descendants. And it offers the descendants of slaves a piece of property (an easement for access), however small, that their ancestors left for them.

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[101] *Cf.* In re African American Slave Descendants' Litigation, __ F.Supp.2d __ (2005) (dismissing reparations suit, *inter alia*, because plaintiffs are not linked to the people enslaved by defendant corporations).

[102] I am indebted to Calvin Massey for suggesting this aspect of the symbolic importance of cemetery visits. It reminds me, also, of Ralph Ellison's eloquent statement about how much of what we think of as American culture derives from African American culture and vice versa and the contradictions borne of those disparate origins. *See, e.g.*, Ralph Ellison, *Going to the Territory*, *in* THE COLLECTED WORKS OF RALPH ELLISON 594-95 (John Callahan ed. 1995). Ellison also explores this with particular wit through a vignette of a young African American man wearing a Confederate cap in his class day talk May 15, 1990, at Columbia. *See Notes for Class Day Talk at Columbia University*, in *id.* at 839-41.