

DIAGNOSING THE ILLS OF AMERICAN MONUMENT-  
PROTECTION LAWS: A RESPONSE TO PHELPS AND OWLEY'S  
*ETCHED IN STONE*

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Like many other places in the United States, the town of Springfield, Kentucky, was repeatedly ravaged in the nineteenth century by cholera, a disease that is easily and swiftly communicable through feces-contaminated drinking water or food.<sup>1</sup> Today, cholera is little thought of in this country—or at least it was little thought of until very recently,<sup>2</sup> although it has persisted in many parts of the world through the present.<sup>3</sup> But in the nineteenth century cholera outbreaks were a recurring disaster in American life, fueled by poor sanitation, medical ignorance, and racist, nativist, and religious prejudice.<sup>4</sup>

Several of the worst cholera outbreaks in the United States occurred before the Civil War<sup>5</sup>—a time when American attitudes toward monuments and preservation were far less positive than they are today.<sup>6</sup> Nevertheless, one can find memorials to the victims and heroes of past cholera epidemics scattered throughout American cities, towns, and rural

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1. *Cholera*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 349–50 (32d ed. 2012).

2. *E.g.*, David Oshinsky, *When Epidemics Wreaked Havoc in America*, WALL ST. J. (Mar. 13, 2020), <https://www.wsj.com/articles/americas-forgotten-epidemics-11584113203> [<https://perma.cc/AP7D-8QT2>] (discussing the effects of Cholera on America).

3. *E.g.*, *Cholera: The Forgotten Pandemic*, WHO (Oct. 22, 2018), <https://www.who.int/cholera/the-forgotten-pandemic/en/> [<https://perma.cc/Q4WP-YUJC>] (“Over the last year, cholera (or suspected cholera) outbreaks have struck in Algeria, Angola, Bangladesh, Burundi, Chad, the Democratic Republic of the Congo, Djibouti, Ethiopia, Kenya, The Kingdom of Saudi Arabia, India, Malawi, Mozambique, Nigeria, Niger, Somalia, Sudan, South Sudan, United Republic of Tanzania, Uganda, Yemen, Zambia, and Zimbabwe, while the long-running outbreak in Haiti continues.”).

4. *See* JOHN M. WOODWORTH, *THE CHOLERA EPIDEMIC OF 1873 IN THE UNITED STATES* 7 (1874); *see also* Walter J. Daly, *The Black Cholera Comes to the Central Valley of America in the 19th Century – 1832, 1849, and Later*, 119 *TRANSACTIONS AM. CLINICAL & CLIMATOLOGICAL ASS'N* 143, 143–44 (2008) (noting that “cholera’s infectiousness was denied by accepted authorities” in the early 19th century, who blamed instead “miasmas,” “poor blacks,” and “the religion of the Irish immigrants”).

5. *See id.* at 144–45.

6. Zachary Bray, *We Are All Growing Old Together: Making Sense of America’s Monument-Protection Laws*, 61 *WM. & MARY L. REV.* 1259, 1263–65, 1278–88 (2020) [hereinafter *Making Sense of America’s Monument-Protection Laws*].

places<sup>7</sup>—just like monuments to outbreaks of other diseases<sup>8</sup>—though American monuments to epidemics tend to be relatively modest in their size and scope.<sup>9</sup>

Two such monuments can be found in Springfield, a small town in central Kentucky established in 1793.<sup>10</sup> Historic preservation and monuments are important in Springfield for many reasons, as they are in other similar small towns across the country.<sup>11</sup> Many of the commercial buildings and homes in and around Springfield’s central business district are well-preserved and date back a hundred years or more. In addition, the courthouse and many churches in and around town date back to the early nineteenth century, and the town is connected both to Abraham Lincoln’s family and the Civil War in Kentucky—all of which provide points of interest for tourists as well as the town’s residents.<sup>12</sup>

Cholera came to Springfield several times in the nineteenth century, and one of the worst outbreaks hit in 1833. As was common during cholera outbreaks, many of those with the means to do so fled Springfield in haste, frequently spreading the infection to their places of refuge, while leaving behind enslaved people to look after their businesses and homes.<sup>13</sup> George Sansbury, a slaveowner in Springfield, was among those who fled the outbreak of the disease.<sup>14</sup> Before fleeing, George

7. See, e.g., Dan Barry, *With Shovels and Science, a Grim Story is Told*, N.Y. TIMES (Mar. 24, 2013), <https://www.nytimes.com/2013/03/25/us/secrets-of-duffys-cut-yeild-to-shovel-and-science.html> [<https://perma.cc/G3Y2-CMAW>] (describing the modest monument at Duffy’s Cut, a mass grave for dozens of Irish immigrants who died, some violently, during a cholera outbreak).

8. E.g., Jack Thurston, *Memorial to Victims of Spanish Flu Taking Shape in Vermont*, NECN (last updated Oct. 9, 2018, 6:01 PM), <https://www.necn.com/news/local/vermont/memorial-to-victims-of-spanish-flu-taking-shape-in-vermont/39610/> [<https://perma.cc/PCN5-35PA>] (describing a memorial in Vermont dedicated to victims of the Spanish Flu).

9. See *id.* (describing the memorial as a reflection bench); see also Barry, *supra* note 7 (describing the small monument at Duffy’s Cut); *infra* notes 27–28 (describing the modest monuments to Louis Sansbury in Springfield).

10. E.g., *City of Springfield History*, VISIT SPRINGFIELD KENTUCKY, <https://www.springfieldky.org/about/history/> [<https://perma.cc/Z36A-TB5G>].

11. See, e.g., *id.* (urging visitors to Springfield to interact with the community’s many “relics . . . and be a part of history”).

12. *Id.*; see also *Springfield, Kentucky Tourism* <https://www.kentuckytourism.com/springfield/attractions/main-streets/springfield> [<https://perma.cc/H938-9U3Y>] (describing “quaint boutiques hidden among the historic buildings” and noting that Springfield’s residents “are dedicated to their traditions, rich heritage and history”).

13. See, e.g., *Cholera Days: Reminiscences of the Visitation of Cholera to Springfield Years Ago*, NEWS-LEADER (Springfield, Ky.), March 13, 1902 [hereinafter *Cholera Days*] (noting that during the 1833 outbreak “as many of the inhabitants as could get away fled . . . so that only a few faithful ones were left to attend the sick and bury the dead” and that “a great many” enslaved people left behind were “victims to the disease”).

14. *Sansbury, Louis*, NOTABLE KENTUCKY AFRICAN AMERICANS DATABASE (last updated Oct. 8, 2018, 7:40 PM) <https://nkaa.uky.edu/nkaa/items/show/1958> [<https://perma.cc/Z89B->

directed two enslaved persons, Louis Sansbury and Matilda Sims, to remain in Springfield and watch over his hotel.<sup>15</sup>

In addition to watching over George's hotel and the abandoned property of other slaveowners, Louis and Matilda treated the sick and dying who remained in Springfield, while burying those they could not save in the town cemetery,<sup>16</sup> perhaps thereby curtailing the spread of the infection. Although Matilda and Louis lacked formal medical training, given the lack of scientific understanding of and the many counterproductive treatments then popular for cholera,<sup>17</sup> the care that they provided their neighbors may have been the best possible treatment available.

The proportion of the sick among those who remained in Springfield must have been overwhelming. At least eighty of the town's 618 inhabitants died in the 1833 outbreak,<sup>18</sup> but the actual total may have been much higher, in part because Springfield kept poor records of the deaths of enslaved people.<sup>19</sup> Despite the sickness and death all around them, Louis and Matilda survived, whether from previous exposure or some other unknown cause.<sup>20</sup>

After the 1833 outbreak subsided, George returned to Springfield, where he continued to enslave Louis until George's own death in 1845.<sup>21</sup> At George's death, the town of Springfield purchased Louis's freedom and provided him with a shop located on Main Street.<sup>22</sup> In 1854 cholera came to Springfield again, and again Louis remained, caring for the sick and burying the dead after the town was abandoned by virtually everyone able to leave.<sup>23</sup> Louis survived the 1854 cholera outbreak as well as the 1833 outbreak; in fact, he survived until April 12, 1861<sup>24</sup>—the very day that the Civil War began at Fort Sumter in South Carolina.<sup>25</sup>

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15. *Id.*

16. *Id.*

17. *See e.g.,* Daly, *supra* note 4, at 144.

18. MIMI O'MALLEY, *IT HAPPENED IN KENTUCKY: REMARKABLE EVENTS THAT SHAPED HISTORY* 50 (2d ed. 2011).

19. *Id.*

20. *Id.*

21. *See Sansbury, Louis, supra* note 14.

22. *Id.*; *see also Cholera Days, supra* note 13 (noting that Louis "was not forgotten" by his neighbors who "made up a purse and purchased his freedom of his master and also built for him [a stable and] set him up in business").

23. *Sansbury, Louis, supra* note 14; *see also* O'MALLEY, *supra* note 18, at 52.

24. O'MALLEY, *supra* note 18, at 52.

25. *See* Dr. James McPherson, *A Brief Overview of the American Civil War*, AM. BATTLEFIELD TRUST, <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> [<https://perma.cc/PCA8-TACK>].

Although Louis Sansbury was buried in an unmarked grave,<sup>26</sup> today there are two monuments to him and the neighbors for whom he cared. The first is a stone marker with an inscription and a cross on Springfield's Cemetery Hill, near the unmarked graves where Louis buried those neighbors whom he was unable to save.<sup>27</sup> The second is a metal sign and marker with a more extensive summary of Louis's life, titled "In Honor of Louis Sansbury, Hometown Hero." The sign is set into an exterior brick wall of a building on Main Street and makes up part of a historic and scenic walk through the old town.<sup>28</sup>

Within a few miles of these monuments to Louis and the cholera victims are many others, covering a wide range of figures and events from Springfield's past. They include memorials for local soldiers and sailors who died in World Wars I and II, Korea, and Vietnam; a stone pedestal and metal plaque picking out the former clerk's office where Abraham Lincoln's parents' wedding license was issued; and a marker commemorating an 1863 raid by Confederate troops and the enthusiastic greeting they received from many of the town's inhabitants, euphemistically titled "Busy Day in Springfield."<sup>29</sup>

Not all of these monuments are of equal worth, especially to a modern eye. Some commemorate moments that may seem trivial, while others celebrate events or people undeserving of acclaim. But it is impossible to understand the relationship that a small town like Springfield has with its past without trying to reckon with all of the monuments that it chooses to protect, and all of the laws and customs that it uses to protect them. Wide-ranging vision and a steady gaze are needed to observe and describe the entire picture.

As in their other work, Jess Phelps and Professor Jessica Owley provide this sort of vision in *Etched in Stone: Historic Preservation Law and Confederate Monuments* ("Etched in Stone"), their recently-published Article in the *Florida Law Review*.<sup>30</sup> In some of their past work, Phelps and Professor Owley have helped illuminate the complicated mix of ownership and protection for Confederate monuments across the

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26. *Sansbury, Louis*, *supra* note 14.

27. See *Cemetery Hill Cemetery*, FIND A GRAVE, findagrave.com/cemetery/2234495/cemetery-hill-cemetery [https://perma.cc/F8VP-CTVM] (providing an image taken by Sue P. taken on May 13, 2013, on file with the author, of the Springfield Cemetery Hill cholera epidemic monument).

28. See *In Honor of Louis Sansbury: Hometown Hero*, HISTORICAL MARKER DATABASE (last updated Aug. 17, 2018), https://www.hmdb.org/m.asp?m=121747 [https://perma.cc/VLT6-KBCH] (providing an image of this marker, on file with the author).

29. *Id.*

30. Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627 (2019) [hereinafter *Etched in Stone*].

country.<sup>31</sup> *Etched in Stone* carries on in this vein, while making several additional and significant contributions to the legal academic literature on Confederate monuments narrowly and historic preservation more generally.

First, Phelps and Professor Owley help show how a host of neutral tools for historic preservation and conservation can thwart or delay efforts by communities that wish to modify or eliminate their Confederate monuments.<sup>32</sup> In other words, Phelps and Professor Owley show how the federal, state, and local tools designed to encourage monuments to people as heroic as Louis Sansbury or places as innocuous as the former location of a clerk's office can and are used to prevent the removal of Confederate monuments, even when removal is strongly supported by most of the monuments' neighbors.

This is essential work. The history around Confederate monuments and the specific "statue statutes"<sup>33</sup> that protect them is particularly ugly.<sup>34</sup> State legislatures should repeal these statutes, but until they do, local governments that wish to rid themselves of these monuments will need to look for vulnerabilities in these statutes.<sup>35</sup> Those local governments that are inclined to fight against existing statue statutes may find several recurring flaws within the statutes themselves, which some local governments have already successfully exploited.<sup>36</sup> Moreover, local governments may find that the statutes and the monuments they protect are constitutionally suspect, violating some or all of the rights protected by the First, Thirteenth, and Fourteenth Amendments.<sup>37</sup> But as

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31. See Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPP. 15, 18–32 (2018) [hereinafter *Understanding the Complicated Landscape*] (providing, inter alia, a typology of the private, public, and "public-ish" sources of land, money, protection, and support for Confederate monuments in a variety of American landscapes).

32. *Etched in Stone*, *supra* note 30, at 640–42, 668–76.

33. I use the term "statue statutes," taken from Professor Richard Schragger's work, to refer to the state-specific statutes in many states that restrict the removal or modification of Confederate monuments. Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 63 (2018) [hereinafter *White Supremacists*].

34. See generally SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (20th anniversary ed. 2018) (noting the connections between white supremacist violence and the creation of many Confederate monuments as well as many statue statutes).

35. See Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes,"* 91 TEMP. L. REV. 1, 13–44 (2018) [hereinafter *Monuments of Folly*] (highlighting vulnerabilities in different "statue statutes").

36. See *id.* (exploring the recurring flaws across various statue statutes and suggesting avenues for legal challenges).

37. See Richard C. Schragger, *What is 'Government' 'Speech'? The Case of Confederate Monuments*, 108 KY. L.J. (forthcoming 2020) [hereinafter *What is 'Government' 'Speech'?*] (concluding that "government speech that is a product of a deeply flawed political process should be constitutionally problematic," and that "[t]he Confederate monuments erected during the Jim

problematic as the statue statutes may be, it is also important to recognize that other more generally applied statutes and private conservation tools also may frustrate local governments wishing to alter or remove such monuments<sup>38</sup>—as *Etched in Stone* carefully and thoroughly does.<sup>39</sup>

Second, and perhaps even more importantly, Phelps and Professor Owley illustrate how a wide range of essentially static historic preservation laws relate to ever-changing debates about the present meaning of structures built to remind us of the past.<sup>40</sup> Put another way, *Etched in Stone* helps reveal some of the reasons why American monument conflicts are often so intractable. As Phelps and Professor Owley write, “American heritage preservation laws generally view change as bad.”<sup>41</sup> But this means that when it comes to monuments, which, unlike other subjects of historic preservation, are often consciously designed to transmit messages to future generations, there are few legal “mechanisms [that] allow for a fresh look or a critical reevaluation.”<sup>42</sup>

And yet such a fresh look—or, more precisely, such a process of continual critical re-evaluation—is exactly what we ought to do with monuments, and exactly what we ought to expect from our monument-protection laws. For example, many of the monuments in Springfield described above could do with some revisions, deletions, and expansions. Even monuments to figures as superhumanly brave and compassionate as Louis Sansbury are in constant need of updating, or at least continuous critical re-evaluation. To name just one example, there is no mention of Matilda Sims in either of the Springfield monuments that commemorate Louis’s heroism, though it may seem difficult to justify her omission today.

The need for monumental alteration, revision, and sometimes removal is inevitable. As a monument endures in time, the messages and social meaning with which it is associated can shift, even as the values of those who live near a monument may change from the values of those who

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Crow era . . . are the very antithesis of representative”); Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 KY. L.J. (forthcoming 2020) (arguing that the Thirteenth Amendment’s “prohibition against the badges of slavery . . . grounds efforts to remove Confederate symbols from government properties”).

38. See generally *Making Sense of America’s Monument-Protection Laws*, *supra* note 6, at 1319–327 (comparing statue statutes, the NHPA, and the Antiquities Act).

39. *Etched in Stone*, *supra* note 30, at 640–58, 668–85 (describing sources of law other than “statue statutes” that may interfere with local governmental efforts).

40. See *id.* at 631 (noting that “ongoing debates over historical meaning of events and structures collide with static historic preservation protection efforts”).

41. *Id.* at 688.

42. *Id.*

created or decided to protect it in the first place.<sup>43</sup> Indeed, processes of preservation themselves, both legal and cultural, can give monumental (and sometimes monumentally problematic) meaning to objects and places that may never have been intended as monuments before, or that may not have been perceived as monuments for some time after their creation or preservation.<sup>44</sup>

These features of monument protection and monument conflict are not necessarily unique to the United States—the meaning of monuments everywhere is inherently contingent, and the creation or recognition of a monument inevitably creates the potential for conflict or rejection by future generations. But there are many other features of American life that have made American monument conflicts particularly heated in recent years. First, American attitudes toward monuments and monument-protection laws have been categorized by alternating impulses of affection, insecurity, and suspicion.<sup>45</sup> In recent decades, America has undergone a renewed burst of enthusiasm for monuments of all types, but contemporary attitudes are very different from those of the Revolutionary generation.<sup>46</sup> Moreover, American plurality complicates any consensus about what American identity is or should be, and this plurality, as Professor Sanford Levinson has recently noted, can lead to “raucous debate about our shared history and the dispensation of public honor.”<sup>47</sup> Finally, America’s federal structure—the relationship within states, between cities and state legislatures, and an increasing societal rural-urban divide—can exacerbate debates over monuments in both rural and urban American settings.<sup>48</sup> Not only is it difficult to resolve some long-running American monument conflicts, it can be difficult even to

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43. See *What is ‘Government’ ‘Speech’?*, *supra* note 37 (“To be sure, meanings [of monuments] change. Some motivations recede and others take their place. . . . I think it is fair to say that many people viewed Confederate statues differently after the violence in Charlottesville and elsewhere.”).

44. See, e.g., DANIEL VIVIAN, *A NEW PLANTATION WORLD: SPORTING ESTATES IN THE SOUTH CAROLINA LOWCOUNTRY, 1900–1940* (2018) (describing the construction and especially the monumental reconstruction of the South Carolina Lowcountry landscape); Stephen Clowney, *Sororities as Confederate Monuments*, 108 KY. L.J. (forthcoming 2020) (arguing that many sorority houses on college campuses are monuments to some of the worst aspects of the Confederacy).

45. *Making Sense of America’s Monument-Protection Laws*, *supra* note 6, at 1263–66.

46. See *id.*

47. See Sanford Levinson, *Written in Stone: The Meaning of Public Monuments and Whether They Remain or Go*, 108 KY. L.J. (forthcoming 2020).

48. See Zachary Bray, *From ‘Wonderful Grandeur’ to ‘Awful Things’: What the Antiquities Act and National Monuments Reveal about the Statue Statutes and Confederate Monuments*, 108 KY. L.J. (forthcoming 2020) [hereinafter *From ‘Wonderful Grandeur’ to ‘Awful Things’*] (arguing that some contemporary monument conflicts in the United States “have become so heated and prominent in recent years . . . because they are almost uniquely effective in evoking” a larger rural-urban divide that cleaves through American society).

determine *who* should be tasked with resolving some American monument conflicts.<sup>49</sup>

#### CONCLUSION

The problems addressed by Phelps and Professor Owley run deep in American culture and law, and the nature and history of American monument conflicts suggests that they may never be fully healed: many of the monuments that now fill our civic spaces and landscapes have become lightning rods for conflict and anchors for deeper cultural and political divides.<sup>50</sup> But as *Etched in Stone* suggests, we can and should improve the flexibility of our monument protection laws, thereby making current and future monument conflicts less virulent.

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49. Levinson, *supra* note 47 (noting that it is as difficult to decide “[w]ho exactly should be tasked with resolving . . . debates surrounding the allocation of public honor” as it is to decide substantive questions about monument creation and alteration).

50. See *Making Sense of America’s Monument-Protection Laws*, *supra* note 6, at 1327–28.