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MONUMENTAL QUESTIONS AND HOW WE HONOR THEM

*Melynda J. Price**

We are in another moment where who and how we memorialize is being reconsidered in communities small and large. My colleague, Zachary Bray, and I proposed this symposium to the *Kentucky Law Journal* because the topic reflected our shared interests in the debate over memorials and which historical narrative should triumph in the public square. We arrive at the question from different intellectual paths, but the common concern is over when and how stakeholders can and will revise that narrative through the regulation of monuments. These revisions often come in the form of calls for, if not outright, removal of those materials that do not fit with the communities current or aspirant view of itself and its history.

On November 1, 2019, Professor Bray, the *Kentucky Law Journal*, and myself organized a symposium on *American Monuments and Monument–Protection Laws*. We borrowed the name of the symposium from Sanford Levinson’s book *Written in Stone: Public Monuments in Changing Societies*.² This work published in 1998 still stands as a touchstone for how we think about the legal and political meaning of what could generally be called public art. Levinson looks at monuments from the United States to Eastern Europe to explore how transformations in the public landscape reflect the attitudes of the existing order, which I read as the politically powerful. As Levinson describes it:

Art is, among other things, both the terrain of, and often a weapon in, the culture wars that course through societies. This is, of course, especially true of public art, the art chosen self-consciously by public institutions to symbolize the public order and to inculcate in its viewers appropriate attitudes toward that order.³

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² SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (20th ed. 1998). Sanford Levinson is the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law and Professor of Government at the University of Texas at Austin School of Law. *Sanford V Levinson*, U. TEX. AUSTIN SCH. L., <https://law.utexas.edu/faculty/sanford-v-levinson> [<https://perma.cc/93HB-HN9Y>].

³ LEVINSON, *supra* note 2, at 31–32.

Citing to the influence of Michel Foucault, Levinson points to the way the state “devotes much of its resources to defining what is ‘regular’ or, ultimately, ‘normal,’ within a given political-cultural order.”⁴ His scholarly work on the issue made Levinson the most fitting choice to open the symposium. Levinson’s contribution to this symposium issue brings him back to a significant focus of his analysis in *Written in Stone*, “Southern cities and their use of public space.”⁵

The University of Kentucky is located in a Southern city where we have had our own conflict over what symbols should occupy our public space. Lexington was part of a national wave of municipalities removing Confederate statues from public spaces.⁶ From Annapolis, Maryland to Brooklyn, New York to New Orleans, Louisiana, Confederate statues and memorials were taken down or removed.⁷ It was hard to miss the statues of John Hunt Morgan and John C. Breckinridge, two key figures in the Confederacy and the Civil War, at the steps of the Old Courthouse in downtown Lexington.⁸ The statues stood at the site of the Lexington’s Farmers Market and the past site of the slave markets where human beings were bought and sold as easily as the fruits and vegetables on Saturday morning.⁹ The ways that citizens encountered this space was clear in the vastly different opinions expressed in public hearings prior to the removal.¹⁰

Our local debate reflected the debates in other locations—a complex conversation of conflicting historical narratives, how to determine who is worthy of memorial, and the legality of removing these statues. The symposium was intentionally interdisciplinary because we wanted draw on scholars who could speak to all aspects of these debates. We included legal scholars as well as historians, political scientists, and a former mayor. This varied group of scholars led to the kind of robust conversation that is needed to make sense of why these removals have been so controversial and how we reconcile the controversies to come.

Amy Murrell Taylor¹¹ and Vanessa Holden¹² of the University of Kentucky history department brought to bear their substantial expertise in the history of slavery and the South, as well as their experience with interpretation of historical sites for

⁴ *Id.* at 70.

⁵ *Id.* at 32.

⁶ Jess Bidgood et al., *Confederate Monuments are Coming Down Across the United States. Here’s a List*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html> [https://perma.cc/7Y9C-VGW2].

⁷ *Id.*

⁸ See generally Karla Ward & Beth Musgrave, *Confederate Statues Quietly Moved to Lexington Cemetery*, LEXINGTON HERALD-LEADER (July 24, 2018, 7:19 PM), <https://www.kentucky.com/news/local/counties/fayette-county/article215463045.html>.

⁹ See Tom Eblen, *Confederate Statues Now Gone from the Public Square. What Should Replace Them?*, LEXINGTON HERALD-LEADER (Dec. 23, 2017, 5:28 PM), <https://www.kentucky.com/news/local/news-columns-blogs/tom-eblen/article191437149.html>.

¹⁰ See Beth Musgrave, *New Orleans Removed its Confederate Monuments. What Will Lexington Do?*, LEXINGTON HERALD-LEADER (May 26, 2017, 4:47 PM), <https://www.kentucky.com/news/local/counties/fayette-county/article152916439.html>.

¹¹ Amy Murrell Taylor, U. KY. C. ARTS & SCI., <https://history.as.uky.edu/users/amta237> [https://perma.cc/FV7J-2NUG].

¹² Vanessa Holden, U. KY. C. ARTS & SCI., <https://history.as.uky.edu/users/vnho222> [https://perma.cc/MSS2-Y24B].

visitors. Professor Taylor began with a reminder that, “these few years have been less of a watershed moment in American commemorative practices than a period that has highlighted how ever-changing our monument landscape has *always* been.”¹³ Taylor, as with the historians that followed throughout the day, emphasized the importance of context for the creation of monuments and how that context is erased after the monument is erected.¹⁴ Vanessa Holden’s scholarship on the role of women and children in slave insurrections has led to working with the descendants of Nat Turner on the preservation of the places significant to slave rebellion. Kathi Kern, a historian and Associate Provost for Teaching, Learning and Innovation at the University of Kentucky,¹⁵ explained how contested historical interpretations about the South and the Civil War are not exclusive to the southern terrain by discussing her visits to the Gettysburg historical site over the memorialization of historical events and figures beyond battlefields and in our everyday landscapes. Her presentations showed how her personal experiences with this site ran parallel to evolving debates among historians. Valeria Sinclair-Chapman, an Associate Professor of Political Science at Purdue University,¹⁶ discussed her work on the attempts by the rapper Kanye West to reclaim the Confederate flag as a symbol of divisiveness.¹⁷

The local debate over memorials in the Lexington community has not been limited to the Courthouse. The University of Kentucky has also spent time negotiating its response to recurring concern over a Depression-era mural on its campus.¹⁸ The mural completed by Anne Rice O’Hanlon in 1934, has been criticized for its depictions of Black and Native Americans in recent years, and in 2019 it was closed for use as a classroom space.¹⁹ Professor Anastasia Curwood, historian and Director of the African American and Africana Studies Program at the University of Kentucky,²⁰ and myself both served on university committees to deliberate over the

¹³ Amy Murrell Taylor, Theodore A. Hallam Professor of History, Univ. of Ky., Panel at the Kentucky Law Journal Symposium: Written in Stone: American Monuments and Monument-Protection Laws (Nov. 1, 2019) (quoting Professor Taylor’s panel presentation notes).

¹⁴ *Id.*

¹⁵ Kathi Kern, U. KY. C. ARTS & SCI., <https://history.as.uky.edu/users/kern> [<https://perma.cc/LCP8-VREJ>].

¹⁶ Valeria Sinclair-Chapman, PURDUE U. C. LIBERAL ARTS, https://cla.purdue.edu/facultyStaff/profiles/new/newfaculty-13/Sinclair-Chapman_Valeria.html [<https://perma.cc/D4JQ-GU4Q>].

¹⁷ See Valeria Sinclair-Chapman, *(De)Constructing Symbols: Charlottesville, the Confederate Flag, and a Case for Disrupting Symbolic Meaning*, 6 POL. GROUPS & IDENTITIES 316, 320–21 (2018).

¹⁸ The mural was one of over 15,000 works of art commissioned by the Work Progress Association. Harriet W. Fowler, *Ann O’Hanlon’s Kentucky Mural*, KY. REV., Spring 1988, at 57, 58.

¹⁹ Nick Anderson, *Some Saw a University of Kentucky Mural as Racially Offensive. Here’s the School’s Solution*, WASH. POST (Aug. 24, 2018, 10:00 AM), <https://www.washingtonpost.com/news/grade-point/wp/2018/08/24/some-saw-a-university-of-kentucky-mural-as-racist-so-the-school-found-a-solution> [<https://perma.cc/M8WG-AXSQ>]; see also Linda Blackford, *UK to Close Memorial Hall to Required Classes in Spring. Will it End Mural Controversy?*, LEXINGTON HERALD-LEADER (Sept. 5, 2019, 12:24 PM), <https://www.kentucky.com/opinion/article234693507.html>; Sarah Ladd, *UK to Cover Memorial Hall Mural after Student Sit-in*, KENTUCKYKERNEL (Apr. 2, 2019), http://www.kykernel.com/news/uk-to-cover-memorial-hall-mural-after-student-sit-in/article_6e5b19ac-5597-11e9-b72f-2bd8a2030a53.html [<https://perma.cc/Q86U-NYH7>].

²⁰ Anastasia Curwood, U. KY. C. ARTS & SCI., <https://history.as.uky.edu/users/accu226> [<https://perma.cc/3AAD-QBBT>].

University's response to the O'Hanlon mural.²¹ This panel was the first of two where participants heard from those charged with how to handle conflict over controversial representations of history in public art.

In an effort to hear from those who have worked directly to revise history in the various aspects of the public square, we invited Judge Robert L. Wilkins who serves on the United States Court of Appeals for the District of Columbia to speak about his participation in the development of National Museum of African American History and Culture, which is part of the Smithsonian Institution in Washington, DC. He discussed his book, *Long Road to Hard Truth: The 100-Year Mission to Create the National Museum of African American History and Culture*. This book chronicles the efforts of black activists to create a monument for black veterans of the Civil War that led to a 100-year push to create a museum of black achievements and contributions to America.²² Judge Wilkin's comments helped to lay out the history of how a marginalized group worked to create a public place to honor and memorialize their history, in contrast to other panels who spoke of the difficulty of removing memorials for persons whose worthiness was contested.

Former Mayor Jim Gray²³ was an obvious, but important, choice for the symposium. What began as a measured conversation of the Confederate monuments in Courthouse Square in downtown Lexington years earlier, became the focus of national attention when the decision to remove the statues was expedited by violent protests by white supremacists in Charlottesville, Virginia.²⁴ Although we only invited the former mayor, he brought others who were essential to his decision and the removal of the statues—a minister of a local black Baptist church, a former police chief, the head of the board of the cemetery that agreed to accept the statues, and the artists who owned the company who moved the statues. Each of them spoke to the challenges they faced both personally and from their varied constituencies. The weight of the decision could still be felt in the discussion on the floor of the college's courtroom.

Moving these statues is no easy feat. Mitch Landrieu articulates the difficulties he faced removing Confederate monuments in New Orleans, Louisiana in his 2018 memoir, *In the Shadow of Statues: A White Southerner Confronts History*.²⁵ As mayor, Landrieu removed four statues: three statues of Confederate Generals

²¹ Arden Barnes, *After Hearing Proposals, Committee Still Deciding What Art to Add to Controversial Memorial Hall Mural*, KENTUCKYKERNEL (May 15, 2018), http://www.kykernel.com/news/after-hearing-proposals-committee-still-deciding-what-art-to-add/article_03cf128c-5892-11e8-b2cb-fff2eaade656.html [https://perma.cc/29SU-H8QH]; see also *Capilouto Forms Committee to Recommend Long-term Solution for UK's Controversial Mural*, WKYT (Feb. 4, 2016, 10:35 AM), <https://www.wkyt.com/content/news/Capilouto-forms-committee-to-recommend-long-term-solution-for-UKs-controversial-mural-367667331.html> [https://perma.cc/6BH3-S9DM].

²² ROBERT L. WILKINS, *LONG ROAD TO HARD TRUTH: THE 100-YEAR MISSION TO CREATE THE NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE* 14 (2016).

²³ *Jim Gray (Kentucky)*, BALLOTPEdia, [https://ballotpedia.org/Jim_Gray_\(Kentucky\)](https://ballotpedia.org/Jim_Gray_(Kentucky)) [https://perma.cc/F2QD-KUBQ].

²⁴ See Maya Rhodan, *White Nationalists' Protest Over Confederate Statue May End Up Getting Others Removed*, TIME (Aug. 14, 2017), <https://time.com/4899820/charlottesville-confederate-statues-louisville-lexington-jacksonville/> [https://perma.cc/6U5T-ZJH3].

²⁵ MITCH LANDRIEU, *IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY* 1 (2018).

(Beauregard, Davis, and Lee) and a statue that “commemorated a Reconstruction Era white supremacist attack on the city’s integrated police force.”²⁶ The prologue of the book chronicles the difficulty of finding a crane to execute “an official act authorized by the government in the legislative, judicial, and executive branches.”²⁷ In Landrieu’s view: “The statues were not honoring history, or heroes. They were created as political weapons, part of an effort to hide the truth, which is that the Confederacy was on the wrong side of not just of history, but of humanity.”²⁸

Landrieu’s perspective is among the strongest expressed by elected officials in the cities where statues were removed.²⁹ In his official remarks, Landrieu writes that: “These monuments purposely celebrate a fictional, sanitized Confederacy; ignoring the death, ignoring the enslavement, and the terror that it actually stood for.”³⁰ Landrieu saw the monument removals as critical to New Orleans future. What was clear in the New Orleans case, that is not true in others, was the agreement among various branches of government that removal was permitted.

The legal scholars who participated in the symposium focused largely on conflicts between municipalities and the state or private organizations over when removals are permitted. Richard Schragger, a professor of law at the University of Virginia,³¹ discussed the growing spread of intrastate preemption, which state governments increasingly are turning to in attempts to stifle local governments that wish to remove or alter monuments. As Schragger pointed out, although the weak power of cities is exemplified in such struggles over monuments, the use of intrastate preemption to stifle local controls over monuments is part of a large pattern, which in recent years extended to state governments that attempt to stifle local anti-discrimination controls and environment measures. Although he could not join us on the day, Alexander Tsesis, a professor of law at Loyola University Chicago,³² offers justification for the removal of the statues grounded in the thirteenth Amendment, which authorized states to remove the badges of slavery. As Tsesis

²⁶ Christopher Carbone, *Which Confederate Statues were Removed? A Running List*, FOX NEWS (Aug. 21, 2018), <https://www.foxnews.com/us/which-confederate-statues-were-removed-a-running-list> [<https://perma.cc/4Z3J-7LU3>].

²⁷ LANDRIEU, *supra* note 25, at 2.

²⁸ Mitch Landrieu, *What I Learned from my Fight to Remove Confederate Monuments*, GUARDIAN (Mar. 24, 2018, 6:00 AM), <https://www.theguardian.com/us-news/commentisfree/2018/mar/24/new-orleans-mayor-louisiana-confederate-statues-removal-never-stop-confronting-racial-injustice> [<https://perma.cc/L3WN-D27M>].

²⁹ A notable contrast, was the city of Baltimore where then Mayor Catherine Pugh ordered the statues removed “quickly and quietly.” Colin Campbell & Luke Broadwater, *Citing ‘Safety and Security,’ Pugh has Baltimore Confederate Monuments Taken Down*, BALT. SUN (Aug. 16, 2017), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-monuments-removed-20170816-story.html> [<https://perma.cc/NR4R-EEFQ>] (“There was enough grandstanding, enough speeches being made. Get it done.”).

³⁰ Michael Gerson, *He Took Down Confederate Monuments in his City. He Should be on the Main Stage for 2020.*, WASH. POST (Feb. 11, 2019, 5:05 PM), https://www.washingtonpost.com/opinions/he-took-down-confederate-monuments-in-his-city-he-should-be-on-the-main-stage-for-2020/2019/02/11/f3b36ada-2e27-11e9-8ad3-9a5b113ecd3c_story.html [<https://perma.cc/VB3K-LKNE>].

³¹ Richard C. Schragger, U. VA. SCH. L., <https://www.law.virginia.edu/faculty/profile/rcs4t/1206421> [<https://perma.cc/HQ5M-YM6S>].

³² Alexander Tsesis, LOY. U. CHI. SCH. L., <https://www.luc.edu/law/faculty/facultyandadministrationprofiles/tsesis-alexander.shtml> [<https://perma.cc/YWM5-RXPB>].

points out, the discriminatory history of these monuments renders them constitutionally suspect and provides powerful arguments for their removal.³³ These very different approaches to understanding when local governments can alter their commemorative practices, to borrow Amy Murrell Taylor's wording, show how legally and politically complex these conflicts can be.

A final panel, moderated by Zachary Bray, included Daniel Vivian, a historian and professor of historic preservation at the University of Kentucky,³⁴ who discussed the problems associated with negotiating the how, why, and which of what is worthy of historic preservation. Vivian's presentation, based on his past work about the changing symbolism of plantations that were transformed into sporting estates, grounded the discussion in the actual physical sites of preservation and offered a fluid companion to the offering of Stephen Clowney. Clowney, a law professor at the University of Arkansas,³⁵ shifted the conversation beyond statues and monuments by asking a very provocative but necessary question: are there other sites that should be understood as monuments to the confederacy, including on or near our university campuses—perhaps monuments which, for some, have become nearly invisible, or at least unremarkable parts of the campus landscape?

The symposium closed with a keynote from Martha Jones, a lawyer and legal historian at Johns Hopkins University.³⁶ One only has to read the introduction to her most recent book, *Birthright Citizens: A History of Race and Rights in Antebellum America*, to understand the kind of attentiveness to space as location and marker of belonging that Professor Jones has long incorporated into her work.³⁷ Jones walks us through the origin of this work in her experience as a public interest lawyer in New York trial courts.³⁸ She writes, “[i]n the local courthouse, race met rights in the lives of people that class-action litigation and appellate courts rarely reached.”³⁹ Courthouses and their grounds are significant in defining belonging and state power in African American history.⁴⁰ Throughout this work, Jones signals the focus of her address to the symposium: Chief Justice Roger Taney and her encounters with memorials to Taney.⁴¹ The Taney memorial is distinct from many of the other Confederate memorials dedicated to generals or other military leaders. Taney is most known for his opinion in the Dred Scott case, or *Scott v. Sanford* (1857), in which he

³³ Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 545 (2002).

³⁴ Daniel Vivian, U. KY. C. DESIGN, <https://design.uky.edu/people/daniel-vivian/> [<https://perma.cc/P5HM-CAJ3>].

³⁵ Steve Clowney, U. ARK. SCH. L., <https://law.uark.edu/directory/directory-faculty/uaid/sclowney/name/Steve+Clowney/> [<https://perma.cc/7457-SCDQ>].

³⁶ Martha S. Jones, JOHNS HOPKINS: KRIEGER SCH. ARTS & SCI., <https://history.jhu.edu/directory/martha-jones/> [<https://perma.cc/5423-6NDJ>].

³⁷ See MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 1–15 (2018).

³⁸ *Id.* at ix.

³⁹ *Id.* at x.

⁴⁰ See *id.* at xiv (citing SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* (2007)).

⁴¹ A statue of Chief Justice Taney was one of those removed in Baltimore. Campbell & Broadwater, *supra* note 29.

held “that no African American, enslaved or free, was a citizen of the United States.”⁴²

The epilogue of *Birthright Citizens*, titled “Monuments to Men,” ends with a discussion of the way the meaning of race and its impact on rights have evolved, but the memorials to Taney persist.⁴³ At the end of this book on how belonging and the relationship to rights of free Blacks in the antebellum United States continue to shape the meaning of citizenship, Jones relays an anecdote from Judge Wanda Heard, the first black woman to be chief of the Baltimore circuit courts and a descendant of slaves, who believed her courtroom to be haunted by Chief Justice Taney.⁴⁴ Jones closes with:

We do not need to be believers in ghosts to appreciate Judge Heard’s story. Whether discomfort with her presence is felt by the dead or also by the living, her story underscores the degree to which questions haunt a black woman, the descendant of slaves, when she presides in Baltimore courthouse. Those who challenge her authority may be spirits from the past; they may be twenty-first-century men and women. What is certain is how race still animates that place where the city’s courthouse has sat for more than two centuries. Justice Taney, be he ghost or icon, remains a force in Baltimore even today.⁴⁵

The purpose of this symposium was to interrogate the haunting questions that monuments raise and how we understand the force of their presence in contemporary life.

The description above only gives a functional account of a truly engaging day at the University of Kentucky J. David Rosenberg College of Law. The audience included scholars and students from across the university and members of the community. We chose to open the sometimes cloister-like atmosphere of legal symposia to a broader audience and presenter because we know that the resolution of which monuments, stories, and historical narratives will dominate the public square (or share it) will continue to be contested.

Lastly, we owe the students of the *Kentucky Law Journal* a huge debt of gratitude, particularly Summer Bablitz, the Symposium Chair, and Kyle Schroader, the Editor-in-Chief. Legal scholarship is a rare field that places its scholarly production largely in the hands of students. The students of the *Kentucky Law Journal* stand among the finest of these intellect workers. The success of the symposium is a credit to their hard work and intellectual curiosity.

⁴² JONES, *supra* note 37, at 9.

⁴³ *Id.* at 155–59.

⁴⁴ Tim Prudente, *She was the First Woman to Preside over Baltimore Circuit Court. She Exits Bruised, but with Justice Served.*, BALTIMORE SUN (Dec. 24, 2019), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-judge-wanda-keyes-heard-retires-20191224-xrgxtqp5ijh3jiqhv6on4qagta-story.html> [https://perma.cc/LY9A-7ERK].

⁴⁵ JONES, *supra* note 37, at 160.