

# SAVANNAH LAW REVIEW

VOLUME 2 | NUMBER 1

## PLACE, MEANING, AND THE VISUAL ARGUMENT OF THE ROADSIDE CROSS

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*Edward was a seventeen-year-old high school student. He died as a result of a car accident one summer night along a notoriously dangerous roadway.<sup>1</sup> Edward's grieving family and friends erected a roadside cross on the spot where he died.<sup>2</sup> Edward's memorial cross was added to a twenty-mile stretch of roadway on the outskirts of town. This stretch of road is home to more than a dozen crosses memorializing crash sites over the past decade.<sup>3</sup> During the*

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<sup>1</sup> Sadly, motor vehicle crashes are a leading cause of death for teenagers. See Peter Sidebotham et al., *Understanding Why Children Die in High-Income Countries*, 384 LANCET 915, 919 (2014) ("Motor vehicle fatalities are a major cause of injury deaths in all age groups of children in high-income countries, and are often cited as the largest cause of deaths in adolescents."); see also Adriana Galván, *Insights About Adolescent Behavior, Plasticity, and Policy from Neuroscience Research*, 83 NEURON, 262, 264 (2014) ("Per mile driven, teen drivers are three times more likely than drivers aged 20 and older to be in a fatal crash. Fatalities are even higher among adolescent drivers who are male, driving with adolescent passengers, or newly licensed.").

<sup>2</sup> See, e.g., *Crosses to Bear*, PROVIDENCE J. BULL., Oct. 23, 2005, available at 2005 WLNR 17261982 (describing an eleven-mile stretch of highway in Rhode Island that is home to more than a half-dozen crosses memorializing crash sites, some caused by drunk driving and others by speeding or reckless driving).

<sup>3</sup> See Robin Brown & Terri Sanginiti, *Delaware 72 Stretch Claims Sisters, 9th Victims Since 2000*, NEWS J., Mar. 22, 2014, available at 2014 WLNR 7813952 (detailing a stretch of road in Delaware that has been the site of a series of deadly accidents over the

*accident, Edward's car flattened one of the weathered crosses on the roadside. This leveled cross, memorializing the loss of two teenage sisters, was righted by Edward's mourners as they erected his memorial cross.<sup>4</sup>*

*For Edward's grieving mother, the cross serves to remind other drivers of Edward's death and to encourage them to respect the road.<sup>5</sup> The last alive place isn't just where her son died; it is where she believes that he entered heaven.<sup>6</sup> A year after Edward's death, his mother reports feeling as distraught as she did when he first died.<sup>7</sup> But the memorial helps her feel as if she still has some connection to him and it gives her peace.<sup>8</sup> Driving by the memorial is an emotional trip. It is difficult for the grieving mother, yet each time she goes by, it makes her pause and take time to remember the good things, to say a prayer, and to feel a connection with him again.<sup>9</sup> The memorial serves as a reminder of the fragility of life and that bad things happen.<sup>10</sup> But it also serves as a warning to others and may help reduce bad things from happening in the future.<sup>11</sup>*

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past decade); *see also Roadside Memorials Serve a Purpose*, MONTREAL GAZETTE (Nov. 23, 2010), <http://www2.canada.com/montrealgazette/news/editorial/story.html?id=aa918942-dc4d-440a-b469-3fc5b145607e> (“Several years ago while driving through Montana (which at that time imposed no speed limits on major highways), we saw 200-plus white crosses along a stretch of highway about 200 kilometres. Since then, Montana has imposed a safe speed limit, reducing the carnage on its roads.”).

<sup>4</sup> See Robin Brown & Terri Sanginiti, *Delaware 72 Stretch Claims Sisters, 9th Victims Since 2000*, NEWS J., Mar. 22, 2014, available at 2014 WLNR 7813952 (“A weathered, roadside memorial cross—flattened by the crash, but righted by mourners—stood as proof of that stretch of road’s past tragedies.”).

<sup>5</sup> Emily Allen, *Grieving Parents Plan Roadside Memorial*, OXFORD MAIL (Aug. 29, 2007), <http://www.oxfordmail.co.uk/news/1651125>.

<sup>6</sup> Robert Medley, *Heaven Begins at Roadside Crosses*, OKLAHOMAN, Apr. 29, 2012, available at 2012 WLNR 9136664 (“I knew a mother who said, ‘I don’t look at it as the place my daughter died, but as an entry point to heaven.’”).

<sup>7</sup> Allen, *supra* note 5.

<sup>8</sup> See Marion Murphy, Op-Ed, *Roadside Tributes Help Express Loss*, SUNDAY MAIL (Austl.), Jan. 13, 2013, available at 2013 WLNR 867199 (“I drive over [to the memorial] now and then, and I leave feeling as if I’ve had some connection to him.”); *see also* Miriam Ramirez, *Cross to Bear: Roadside Memorials Testify to Life’s Frailty*, MONITOR, Mar. 26, 2006, available at 2006 WLNR 5016924 (noting how one mother finds comfort in the four crosses along the roadside by “knowing the memory of her children is still very much present—even if it’s just through a memorial erected on the side of the road”); Deborah Sharp, *Battles Over Roadside Shrines More Common*, USA TODAY, (July 12, 2005, 11:42 PM), [http://usatoday30.usatoday.com/news/nation/2005-07-11-roadside-memorials\\_x.htm](http://usatoday30.usatoday.com/news/nation/2005-07-11-roadside-memorials_x.htm) (“I don’t want to bother anybody, but that cross is there for us. No one else. When I go by it, it gives me peace.”).

<sup>9</sup> *Crosses to Bear*, *supra* note 2.

<sup>10</sup> Margaret Gibson, *Death and Grief in the Landscape: Private Memorials in Public Space*, 17 CULTURAL STUD. REV. 146, 150 (2011) (“Memorials serve an important remembering function not because they restore living memory, but because they symbolically articulate and engage with the fragility and temporality of living memory’s mortality.”).

<sup>11</sup> In Rhode Island, a father who drives by the crosses that memorialize where his thirteen-year-old daughter and wife were killed by a drunk driver explained that “in a

## Introduction

Roadside memorials are cenotaphic in so far as they honor a person whose corporeal remains lie elsewhere. They powerfully express the pathos of loss felt by the bereaved.<sup>12</sup> These memorials are part of a global phenomenon where kith and kin create spontaneous shrines to deceased loved ones.<sup>13</sup> And they are intensely personal, idiosyncratic expressions of loss and remembrance.<sup>14</sup>

Some creations are lovingly attended and maintained for years, whereas others stay for just a few months.<sup>15</sup> Some memorials are nearly permanent structures made with engraved stone or metal plaques that are intended to last for years. Others are more temporary displays that disappear after a few weeks, either by natural forces or by vandalism.<sup>16</sup> Some memorials are intended to be seen;<sup>17</sup> they are in a sense performative.<sup>18</sup> On the other hand, some memorials are

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sense it's very difficult to pass," yet "each time I go by, it makes me stop and take the time and remember the good things, and to say a prayer, and to feel that connection with her again." The father also noted that these crosses "serve as a reminder that bad things happen, and maybe they help reduce bad things from happening in the future." Brown & Sanginiti, *supra* note 4.

<sup>12</sup> Avril Maddrell, *Living with the Deceased: Absence, Presence and Absence-Presence*, 20 *CULTURAL GEOGRAPHIES* 501, 516 (2013) [hereinafter Maddrell, *Living with the Deceased*] ("Roadside memorials frequently embody a threefold need to mark the site of a sudden death, communicate to others about that death, and to attempt to give meaning to otherwise senseless loss.").

<sup>13</sup> See, e.g., Jennifer Clark, *Challenging Motoring Functionalism: Roadside Memorials, Heritage & History in Australia & New Zealand*, 29 *J. TRANSP. HISTORY* 23 (2008); Collins & Rhine, *supra* note 33, at 221; George E. Dickinson & Heath C. Hoffmann, *Roadside Memorial Policies in the United States*, 15 *MORTALITY* 154 (2010); Rebecca M. Kennerly, *Getting Messy: In the Field and at the Crossroads with Roadside Shrines*, 22 *TEXT & PERFORMANCE Q.* 229 (2002).

<sup>14</sup> Jennifer Clark & Majella Franzmann, *Authority from Grief, Presence and Place in the Making of Roadside Memorials*, 30 *DEATH STUD.* 579, 584 (2006); C. Allen Haney et al., *Spontaneous Memorialization: Violent Death and Emerging Mourning Ritual*, 35 *OMEGA* 159, 162 (1997).

<sup>15</sup> See, e.g., Peter DeMarco, *More on Roadside Memorials, Bikes*, *BOSTON GLOBE* (June 9, 2013), <http://www.bostonglobe.com/metro/regionals/north/2013/06/08/who-taught-you-drive-right-turns-near-bicycles-roadside-memorials-few-further-thoughts-roadside-memorials-bicycles/0607uB4cFsDp242AfijjDn/story.html> ("Some [roadside memorials] stay for months, others for years, with state and local public works crews deciding on a case-by-case basis when the memorial has outlived its purpose.").

<sup>16</sup> Briggs, *supra* note 34, at 27.

<sup>17</sup> Lisa Marie Cacho, "You Just Don't Know How Much He Meant": *Deviancy, Death, and Devaluation*, 5 *LATINO STUD.* 182, 191-92 (2007) (noting how one "particular memorial was staged in such a way that pedestrians and drivers could not not notice" because it was located on the median of a busy road that was not safe to cross on foot and, "as a result, the memorial was protected from intentional and accidental vandalism").

<sup>18</sup> Gibson, *supra* note 10, at 156 (explaining that the more visible memorial, "[w]hile it is generated out of private grief and memory, its style is nevertheless performative—it is there to be seen").

more personal and private. They may have a public face, but that is only an incidental consequence to the death occurring on a public space.<sup>19</sup>

The creation of a roadside cross memorial to commemorate the death of a loved one is a growing phenomenon worldwide and is reflected in contemporary cultural artifacts. Randy Travis's ballad *Three Wooden Crosses*<sup>20</sup> and Hank Williams Jr.'s song *Cross on the Highway*<sup>21</sup> both expressly acknowledge the purpose and effect of roadside crosses. And Carl Hiaasen's crime novel, *Skinny Dip*, has a character that collects memorial crosses from the roadsides, which he then plants in the yard behind his trailer.<sup>22</sup> These examples highlight the growing cultural interest and familiarity with this phenomenon.

A patchwork of state and local laws regulates roadside memorials. Some states have banned private memorials entirely, a number of states encourage them when placed in safe locations, a few states provide official memorials instead of private ones, and other states have no official policy and defer to cities and municipalities to decide.<sup>23</sup> But even in states where they are banned, public officials often turn a blind eye to memorial crosses out of respect.<sup>24</sup>

But not everyone turns a blind eye to these crosses. In Ohio and California, atheist groups have objected to sectarian symbols like the Latin cross on public property.<sup>25</sup> In Florida and Massachusetts, residents have voiced objections to roadside crosses that serve as painful, daily reminders for years after the accident.<sup>26</sup>

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<sup>19</sup> *Id.* at 157 (“In contrast, other memorials are first and foremost messages of love to the dead. They communicate grief in a more intimate way and their public face is incidental to the death occurring in a publicly visible setting.”).

<sup>20</sup> RANDY TRAVIS, *Three Wooden Crosses*, on RISE AND SHINE (Warner Bros. Records 2002).

<sup>21</sup> HANK WILLIAMS, JR., *Cross on the Highway*, on THE ALMERIA CLUB RECORDINGS (Curb Records 2002).

<sup>22</sup> CARL HIAASEN, *SKINNY DIP* 83-85 (2004).

<sup>23</sup> See Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 NEB. L. REV. 124, 149-55 (2013).

<sup>24</sup> See, e.g., *Memorials Create Dilemma for Cities*, SUN SENTINEL, Feb. 25, 2012, available at 2012 WLNR 4080769 (“Cities across Florida have rules for regulating the erection or duration of roadside memorial markers. But some don’t follow them, to avoid the delicate and emotional issue of taking down a marker in memory of somebody who was killed.”); Chris Ross, *Roadside Memorials: Public Policy vs. Private Expression*, AM. CITY & CNTY. (May 1, 1998), [http://americacityandcounty.com/mag/government\\_roadside\\_memorials\\_public](http://americacityandcounty.com/mag/government_roadside_memorials_public) (“In probably no other area of public life does practice diverge so dramatically from official policy.”).

<sup>25</sup> See Trace Gallagher, *Family Takes Down Roadside Memorial Cross after Atheists Call for Its Removal*, FOX NEWS INSIDER (Mar. 11, 2014, 10:59 PM), <http://foxnewsinsider.com/2014/03/11/family-takes-down-roadside-memorial-cross-after-atheists-call-its-removal>; David Yonke, *Friends Defend Tribute To Crash Victim; Atheist Group Wants Crosses Axed*, BLADE (Mar. 14, 2010), <http://www.toledoblade.com/local/2010/03/14/Friends-defend-tribute-to-crash-victim-Atheist-group-wants-crosses-axed.html>.

<sup>26</sup> Bill Monroe, Op-Ed, *My Word: Roadside Memorials Just Prolong Grief*, ORLANDO SENTINEL (Nov. 20, 2011), [http://articles.orlandosentinel.com/2011-11-20/news/os-ed-roadside-memorials-myword-112011-20111118\\_1\\_roadside-memorials-grief-sign-ordinance](http://articles.orlandosentinel.com/2011-11-20/news/os-ed-roadside-memorials-myword-112011-20111118_1_roadside-memorials-grief-sign-ordinance); Nick Grabbe, *Leverett Neighborhood Wrestles with Weight of Cross*, AMHERST

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Such memorials can reignite or prolong trauma for neighbors and emergency services workers who are forced to regularly encounter the memorials.<sup>27</sup>

When others in a community seek to remove a memorial cross, it can be a contentious and divisive issue.<sup>28</sup> In one Australian community, a cross memorializing a young motorcyclist who died in an accident the year before was removed, and the family pleaded for its return, noting the removal was “just so cruel.”<sup>29</sup> The grieving mother acknowledged, “I know he isn’t buried there but it’s where he died.”<sup>30</sup> The missing cross revived the family’s feelings of loss, and the mother noted, “Your heart just rips apart.”<sup>31</sup>

While mindful of the desire to honor the dead, one observer remarked: “How horrible it would be if more deaths resulted because someone’s attention was diverted by a roadside shrine.”<sup>32</sup> In states like Arizona, Texas, and

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BULL. (June 27, 2008), <http://www.amherstbulletin.com/story/id/98909/> (cited in Dickinson & Hoffmann, *supra* note 13, at 163–64).

<sup>27</sup> See, e.g., *Residents Condemn Roadside Gravestone*, PLYMOUTH EVENING HERALD (U.K.) (Aug. 30, 2008), <http://www.plymouthherald.co.uk/Residents-condemn-roadside-gravestone/story-12675218-detail/story.html> (“Sylvia Albrighton, of Blackstone Close, said: ‘I was appalled. I don’t want to upset Richard’s family, but it is the last thing I want to see every time I go in and out of the close.’”).

<sup>28</sup> See, e.g., Lloyd Ferriss, *Shoulders to Cry On Roadside Death Markers, Giving Voice to Those in Grief, Are Turning Tragic Sites into Places to Find the Comfort of Community*, MAINE SUNDAY TELEGRAM, May 16, 1999, available at 1999 WLNR 5794845; Eben Harrell, *Loss, Grief and the Rise of Roadside Shrines*, SCOTSMAN (Scot.) (March 5, 2007), available at 2007 WLNR 4165961; Barbara E. Martinez, *Mother Makes Case for Road Memorials*, WASH. POST, Mar. 6, 2003, available at 2003 WLNR 18655725; Lindsay Murdoch, *Roadside Memorials Tell of Love and Lives Needlessly Lost*, SYDNEY MORNING HERALD (Aug. 14, 2010), <http://www.smh.com.au/entertainment/art-and-design/roadside-memorials-tell-of-love-and-lives-needlessly-lost-20100813-1234n.html>; Douglas Quan, *Municipalities Mull Regulating Roadside Memorials; Complaints over Decaying Shrines Clash with Families’ Desires to Commemorate Loved Ones Killed in Crashes*, VANCOUVER SUN (Nov. 20, 2010), <http://199.71.40.195/vancouvernews/news/westcoastnews/story.html?id=b296fbd5-9b85-414e-98a6-17aba1bb4422>; Suzie Whitman, *Roadside Remembrance*, DALLAS MORNING NEWS (Oct. 9, 2010, 2:46 AM), <http://www.dallasnews.com/opinion/local-voices/headlines/20101009-Suzie-Whitman-of-Highland-Village-805.ece>; Sherri Zickefoose, *Opinions Sought on Roadside Memorials; Delicate Balance Between Public’s Compassion and Driver Safety*, EDMONTON JOURNAL (Can.), May 8, 2008, available at 2008 WLNR 28154969; *Grief Takes to Roadsides in the Form of Public Displays—Private Monuments Make Some Officials Nervous*, SEATTLE TIMES (June 1, 1999, 12:00 AM), <http://community.seattletimes.nwsourc.com/archive/?date=19990601&slug=2964016>.

<sup>29</sup> Olivia Lambert, *Roadside Thefts Tear at Family’s Heart*, BORDER MAIL (Austl.) (July 4, 2014), <http://www.bordermail.com.au/story/2395279/roadside-thefts-tear-at-familys-heart/>; see also *Roadside Memorial Stolen*, MONTEREY COUNTY HERALD, Nov. 23, 2005, available at 2005 WLNR 18905535 (“Somebody stole a 6-foot-high cross that served as a freeway memorial to a California Highway Patrol officer who was killed while chasing a speeding motorist.”).

<sup>30</sup> Lambert, *supra* note 29.

<sup>31</sup> *Id.*

<sup>32</sup> David Bly, *Dead Not Honoured by Roadside Shrines*, VICTORIA TIMES COLONIST (Can.) (May 22, 2012), <http://www.canada.com/story.html?id=7052a404-6f96-4d92-81e1-86bf51fe6f0f>.

Wyoming, transportation officials report a disconcerting number of deaths caused by drivers distracted by roadside memorials.<sup>33</sup> Transportation officials struggle with balancing sensitivity to the bereaved and protecting public safety.<sup>34</sup> Roadside memorials can interfere with routine road maintenance,<sup>35</sup> and the memorial bricolage can become a traffic hazard, either as a distraction to drivers or as a dangerous projectile in a crash or during mowing operations.<sup>36</sup>

Death and grieving have escaped the socially acceptable zone of the cemetery and are now confronting others as they go about their daily lives—commuting along our nation’s roadways. Part I examines how some bereaved are sanctifying public spaces by erecting private memorials. These memorials are places of remembrance, of pilgrimage, and of warning. They are heterotopic sites that simultaneously seek to keep a relationship with the deceased alive and to bring healing and closure to the grieving process.

Yet this use of public space for private grief is not without contest. These private memorials, which often employ sectarian symbols, can create unwanted, vicarious trauma, traffic safety hazards, and Establishment Clause concerns, which are discussed in Part II. Part III explores the visual argument of ventilating private grief on public spaces. Roadside crosses are a means to resist the erasure of a loved one. Individually, the crosses make the visual argument that the deceased was valuable and is missed. Collectively, the phenomenon is a critique

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<sup>33</sup> See Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 OMEGA 221, 238 (2003) (noting an Arizona Department of Transportation spokesperson said that, of the 4000 rear-end collisions that occurred in a year, “a troubling number involved drivers who stopped to view roadside memorials”); Jon K. Reid & Cynthia L. Reid, *A Cross Marks the Spot: A Study of Roadside Death Memorials in Texas and Oklahoma*, 25 DEATH STUD. 341, 352-53 (2001) (noting a young woman in Texas was killed when she was struck by a car while visiting the roadside memorial of her cousin following the cousin’s funeral); Chris Ross, *Roadside Memorials: Public Policy vs. Private Expression*, AM. CITY & CNTY. (May 1, 1998), [http://americancityandcounty.com/mag/government\\_roadside\\_memorials\\_public](http://americancityandcounty.com/mag/government_roadside_memorials_public) (noting Wyoming Department of Transportation officials pointed to an accident where the death of a child was attributed to a driver who was distracted by a memorial for two young pedestrians killed earlier at the same site).

<sup>34</sup> Sharp, *supra* note 8 (quoting a spokesman for Minnesota’s Department of Transportation: “We don’t want things built on the roadsides that could cause a crash”); Michael Richard Briggs, *Roadside Memorial Practices: An Examination of Landscapes of Commemoration in Warren County, Kentucky* 33 (May 21, 2004) (unpublished MA thesis, Western Kentucky University) (on file with the Western Kentucky University Library) (“Policies establishing a formal process that covers every situation while respecting the feelings of the public will be difficult to institute.”).

<sup>35</sup> Holly J. Everett, *Crossroads: Roadside Accident Memorials in and around Austin, Texas* 57 (June 30, 1998) [hereinafter Everett, *Crossroads*] (unpublished MA thesis, Memorial University of Newfoundland) (“The [roadside memorial] assemblages have become so numerous as to render routine roadway maintenance difficult.”).

<sup>36</sup> Lisa Sandberg, *Private grief, Public road*, SAN ANTONIO EXPRESS-NEWS, (Nov. 13, 2000), available at 2000 WLNR 9677719 (“What people don’t understand is that the most innocent-looking item that can be hit by a car traveling at 70 mph can become like a propeller, crashing through windshields and adding to, instead of deterring, highway fatalities.”) (quoting Texas state transportation spokesman Randall Dillard) (internal quotations omitted).

of modern transportation, modern culture, modern death practices, and modern religion.

But by allowing these crosses to remain and proliferate along the roadside, is there a mixed message sent on behalf of both the memorial maker and the government? If an unauthorized and objectionable symbol, like a Nazi symbol or a pornographic or obscene image, would be promptly removed, what is the effect of not removing an unauthorized religious symbol? The Supreme Court in *Pleasant Grove City, Utah v. Summum* reflected this position when it explained, “It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.”<sup>37</sup> Part IV reviews current Establishment Clause jurisprudence relevant to roadside crosses.

When the government speaks, it is politically accountable for its government speech.<sup>38</sup> But in mixed speech contexts, it is not so much that the government is speaking. Rather, the question is this: When it is not pure government speech, is the government endorsing religion? By allowing religious symbols to remain on public property, is there a tacit endorsement of a religious message? Part V addresses the rhetorical effect of the Latin cross and Establishment Clause concerns to religious outsiders. The unresolved question is: What would the reasonably well-informed observer conclude? This Article provides background and context to inform the hypothetical Establishment Clause observer.<sup>39</sup>

#### I. Private Sanctification of Public Space

Private memorials are individualistic expressions, yet scholars across disciplines who have examined the phenomenon have identified common elements. First, the roadside memorials frequently feature a Latin cross as the focal point.<sup>40</sup> Second, they are erected as close as possible to the last alive place, which is now deemed to be sacred because of the spilled blood of the loved one.<sup>41</sup>

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<sup>37</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 471 (2009).

<sup>38</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, . . . it is, in the end, accountable to the electorate and the political process for its advocacy.”); *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) (explaining that a “remedy” for a grievance against a state for flying the Confederate flag over the state capitol building “lies within the democratic processes of the State of Alabama and the voting rights of all its citizens”); *see also Walker v. Tex. Div., Sons of Confederate Veterans*, No. 14-144, 2015 WL 2473375 (U.S. June 18, 2015) (holding that government speech includes a state’s specialty license plate design, and therefore Texas properly rejected a proposal for such plates featuring the Confederate battle flag).

<sup>39</sup> *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (asking how the purpose and effect prongs of the *Lemon* test would appear to a reasonable observer); *see also infra* Part IV (discussing the reasonable observer).

<sup>40</sup> *See, e.g., Clark & Franzmann, supra* note 14, at 580 n.i; Dickinson & Hoffmann, *supra* note 13, at 164; Briggs, *supra* note 34, at 33; Kate V. Hartig & Kevin M. Dunn, *Roadside Memorials: Interpreting New Deathscapes in Newcastle, New South Wales*, 36 *AUSTL. GEOGRAPHICAL STUD.* 5, 7 (1998).

<sup>41</sup> *See, e.g., Clark, supra* note 13, at 38; *accord* Sylvia Grider, *Spontaneous Shrines and Public Memorialization*, in *DEATH AND RELIGION IN A CHANGING WORLD* 248

And third, these memorials often commemorate the death of a teenager as the result of a car accident.<sup>42</sup>

The locus of the memorial is significant. It becomes a deathscape, because the cross is erected where the loved one was last alive.<sup>43</sup> The place and meaning become inextricably intertwined. Social scientists distinguish between the generality of *space* and the particularity of *place*.<sup>44</sup> Borrowing this distinction, roadside crosses change the abstract, undifferentiated space along our modern roadways into places of meaning and reverence for the bereaved.<sup>45</sup> The place is made sacred by the deceased's spilled blood.<sup>46</sup> These memorials sanctify public space and make it a meaningful private place.<sup>47</sup> In sanctifying the profane, pedestrian roadway,<sup>48</sup> the bereaved are expressing the meaningfulness of the place.<sup>49</sup> The roadside memorial is a site of remembrance,<sup>50</sup> a site of communion,<sup>51</sup> a site of pilgrimage,<sup>52</sup> and a site of warning to others.<sup>53</sup>

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(Kathleen Garcés-Foley ed., 2006) (noting a distinguishing characteristic of the roadside memorial is the "proximity to the precipitating event").

<sup>42</sup> See, e.g., Collins & Rhine, *supra* note 33, at 226; Reid & Reid, *supra* note 33, at 347.

<sup>43</sup> Avril Maddrell & James D. Sidaway, *Introduction: Bringing a Spatial Lens to Death, Dying, Mourning and Remembrance*, in *DEATHSCAPES: SPACES FOR DEATH, DYING, MOURNING AND REMEMBRANCE* 1, 4 (Avril Maddrell & James D. Sidaway eds., 2010) (employing the term "deathscape" both as "places associated with death and for the dead, and how these are imbued with meanings and associations").

<sup>44</sup> See, e.g., John Agnew, *Space: Place*, in *SPACES OF GEOGRAPHICAL THOUGHT* 81, 81 (Paul Cloke & Ron Johnston eds., 2005) ("Terrestrial space is often understood as the plane on which events and objects are located at particular places. Consequently, space is general as opposed to the particularity of place."); MARC AUGÉ, *NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY* 81-84 (1995) (noting the difference between space (or *espace* in French) and place (or *lieu*)); MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 117-18 (2001) (suggesting abstract space (*espace*) becomes a concrete and stable place (*lieu*) when others inhabit or frequent it).

<sup>45</sup> See YI-FU TUAN, *SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE* 6 (1977) ("Space' is more abstract than 'place.' What begins as undifferentiated space becomes place as we get to know it better and endow it with value.").

<sup>46</sup> Collins & Rhine, *supra* note 33, at 228.

<sup>47</sup> Maddrell & Sidaway, *supra* note 43, at 3 ("For the bereaved various significant places can become sacred, sacred to the memory of the deceased . . .").

<sup>48</sup> KENNETH FOOTE, *SHADOWED GROUND: AMERICA'S LANDSCAPES OF VIOLENCE AND TRAGEDY* 8 (1997) ("Sanctification involves the creation of what geographers term a 'sacred' place—a site set apart from its surroundings and dedicated to the memory of an event, person, or group.").

<sup>49</sup> See ROGER CAILLOIS, *MAN AND THE SACRED* 19-20 (Meyer Barash trans., 2001) ("These two worlds, the sacred and the profane, are rigorously defined only in relation to each other. They are mutually exclusive and contradictory. It is useless to try to eliminate this contradiction."); FOOTE, *supra* note 48, at 7 ("Sanctification and obliteration occupy the extremes of the continuum. Sanctification occurs when events are seen to hold some lasting positive meaning that people wish to remember . . . A memorial or monument is the result."); Collins & Rhine, *supra* note 33, at 236 ("[I]t becomes evident that most roadside memorials are not the product of a fad but someone's abiding involvement with a place.").

These roadside crosses are a classic heterotopia.<sup>54</sup> French philosopher Michel Foucault denominated the heterotopia in contrast with the idealized and fictional utopia.<sup>55</sup> Utopias are “fundamentally unreal spaces” that present an idealized and perfect society, whereas heterotopias are real places that serve as “counter-sites.”<sup>56</sup> The heterotopia serves to “juxtapose in a single real place several spaces, several sites that are in themselves incompatible.”<sup>57</sup> Foucault argued that such “counter-sites” are in fact a real site “within the culture” where the real and the ideal “are simultaneously represented, contested, and inverted.”<sup>58</sup> The heterotopia serves to contest and challenge other spaces within the culture.<sup>59</sup> The roadside cross is situated “in-between unequivocal positions”; the cross is a heterotopic place that attempts to create closure while at the same time trying to keep the memories of the past alive.<sup>60</sup>

For unanticipated and complicated grief—like that experienced with the loss of a child—achieving acceptance and equilibrium can be challenging. Some deceased are so strongly missed that their absence is almost tangible, almost present.<sup>61</sup> Such feelings of loss, of absence, “can exert so much force, so much gravity, that it feels as if it pulls one’s heart out,” according to Professor Lars Frers.<sup>62</sup> For those experiencing such complicated grief, the tension between creating closure and maintaining a relationship is reflected in the heterotopia of the roadside cross.

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<sup>50</sup> See, e.g., Robert M. Bednar, *Denying Denial: Trauma, Memory, and Automobility at Roadside Car Crash Shrines*, in RHETORIC, REMEMBRANCE AND VISUAL FORM 128, 137 (Anne Teresa Demo & Bradford Vivian eds., 2012) [hereinafter Bednar, *Denying Denial*].

<sup>51</sup> See, e.g., Clark & Franzmann, *supra* note 14, at 589 (“There is material evidence at the memorial sites that communication with the deceased takes place, and that the deceased is believed to be present in some way and capable of receiving the communication.”); Collins & Rhine, *supra* note 33, at 234 (“When personal items are included in the memorial (toys, sports equipment, favorite snacks, CDs, etc., there is a strong suggestion that the builders are seeking to create a sense of continuity, to emotionally sustain the deceased in their own lives.”).

<sup>52</sup> See, e.g., George Monger, *Modern Wayside Shrine*, 108 FOLKLORE 113, 114 (1997).

<sup>53</sup> See, e.g., Everett, *Crossroads*, *supra* note 35, at 114; Monger, *supra* note 52, at 114.

<sup>54</sup> See generally ELIZABETH HALLAM & JENNY HOCKEY, DEATH, MEMORY AND MATERIAL CULTURE (2001) (acknowledging heterotopic qualities of memorials).

<sup>55</sup> See Michel Foucault, *Of Other Spaces*, 16 DIACRITICS 22 (Jay Miskowiec trans., 1986). Michel Foucault’s 1967 lecture, *Of Other Spaces*, is one of the seminal theoretical texts on space.

<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.* at 25.

<sup>58</sup> *Id.* at 24.

<sup>59</sup> *Id.*

<sup>60</sup> See Katharina Schramm, *Landscapes of Violence: Memory and Sacred Space* 23 HISTORY & MEMORY 5, 7 (2011); see also Primo Levi, *The Gray Zone*, in VIOLENCE IN WAR AND PEACE: AN ANTHOLOGY 83, 83-90 (Nancy Scheper-Hughes & Philippe Bourgois eds., 2004).

<sup>61</sup> Maddrell, *Living With The Deceased*, *supra* note 12, at 505.

<sup>62</sup> Lars Frers, *The Matter of Absence*, 20 CULTURAL GEOGRAPHIES 431, 432 (2013).

Memorials are liminal space that can make the absent present. Professor Avril Maddrell used the term “absence-presence” to mean more than simply being aware of the absence; the absence itself is given presence through the memorial.<sup>63</sup> Like a deafening silence, an absence can be present.<sup>64</sup> The “absent is evoked” and made present through the memorial whereby the absent person is given continued presence.<sup>65</sup> This continued connection with the deceased is corroborated by the flowers, toys, notes, and other memorabilia often included in roadside memorials. The objects placed at the roadside memorial are essentially containers for feelings, and they help maintain a connection with the deceased.

This continued connection—this continuing bond—is deeply meaningful for many bereaved.<sup>66</sup> Rather than seeking to sever the attachment between the bereaved and the deceased, the continuing bonds, bereavement model seeks to continue the connection and resolve the grief by constructing “a durable biography of both the survivor and the deceased.”<sup>67</sup> Those who seek to continue the bonds with the deceased do not deny the reality of death. As Professors Dennis Klass and Robert Goss have noted, “Survivors are not confused about the reality of death, but they also know that if death ends a life, it does not end a relationship.”<sup>68</sup> These continuing bonds need a locus to maintain the connection and memory.<sup>69</sup> The memorial is the material focus that helps maintain the bond. It is the *spatial fix* where the absence is manifested, and the place where the

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<sup>63</sup> Maddrell, *Living With The Deceased*, *supra* note 12, at 505 (“[I]t is the now absent deceased having continuity of presence, being given presence through the experiential and relational tension between the physical absence (not being there) and emotional presence (a sense of still being there), i.e. absence-presence is greater than the sum of the parts.”). The absence is itself experience; “it is not the thing that is experienced as absent that is present, but the absence itself, ‘the presence of absence.’” Frers, *supra* note 62, at 434.

<sup>64</sup> Frers, *supra* note 62, at 435.

<sup>65</sup> Maddrell, *Living With The Deceased*, *supra* note 12, at 505.

<sup>66</sup> *Id.* at 503.

[M]any bereaved people continue to experience a strong sense of the presence of the absent deceased in their lives, and work to give, mark, and insist on, the presence of the deceased in ongoing wider social relations, the material topography of the home and the wider environment.

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... [W]hile not universal, nor always welcome, between one-third and three-quarters of the bereaved experience a sense of continuing bonds, and the majority of these experiences were positive.

*Id.* at 505-07.

<sup>67</sup> Dennis Klass & Robert Goss, *Spiritual Bonds to the Dead in Cross-Cultural and Historical Perspective: Comparative Religion and Modern Grief*, 23 *DEATH STUD.* 547, 547 (1999); see also Simon Shimshon Rubin & Mor Shechory-Stahl, *The Continuing Bonds of Bereaved Parents: A Ten-Year Follow-Up Study with the Two-Track Model of Bereavement*, 66 *OMEGA* 365 (2013).

<sup>68</sup> ROBERT E. GOSS & DENNIS KLASS, *DEAD BUT NOT LOST: GRIEF NARRATIVES IN RELIGIOUS TRADITIONS* 5 (2005).

<sup>69</sup> Maddrell, *Living with the Deceased*, *supra* note 12, at 507.

deceased is remembered.<sup>70</sup> The memorial functions both to symbolize the absent loved one and to act as a conduit for maintaining a connection with that person.<sup>71</sup>

The memorial is used to recognize and document the absent loved one. Those who are absent are perforce not erased and forgotten.<sup>72</sup> As Professor Frers noted, “Someone has to miss something for it to be specifically absent.”<sup>73</sup> The unnamed are forgotten, but those who are absent are remembered. Absence is not simply a void.<sup>74</sup> Professor Morgan Meyer argued that absence can be made concrete through material objects.<sup>75</sup> The memorial makes the deceased present in their absence. These memory places help crystalize and cement a memory, and the locus of the memorial comes to represent the thing commemorated.<sup>76</sup> If there is no meaningful place to remember someone, then there is a risk that the memory will disappear.<sup>77</sup> Memory often needs to connect to a place, and by marking the last alive place, an attempt is made to save the memory.<sup>78</sup> The public memorial makes it harder to forget them.<sup>79</sup>

Professor Robert Bednar has also suggested that the memorial can serve as a proxy for the absent.<sup>80</sup> There can be a type of transference from the life of the deceased to the life of the memorial.<sup>81</sup> The public can then watch as the material

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<sup>70</sup> *Id.* at 509-10.

<sup>71</sup> *Id.* at 517 (“Memorials symbolize and evoke the dead as an absent presence as well as situating absence-presence and acting as a conduit for the practice of continuing relationship.”).

<sup>72</sup> See Lars Meier et al., *The Importance of Absence in The Present: Practices of Remembrance and the Contestation of Absences*, 20 *CULTURAL GEOGRAPHIES* 423, 426 (2013).

<sup>73</sup> Frers, *supra* note 62, at 433.

<sup>74</sup> Meier, *supra* note 72, at 424-25.

<sup>75</sup> Morgan Meyer, *Placing and Tracing Absence: A Material Culture of the Immaterial*, 17 *J. MATERIAL CULTURE* 103, 107 (2012) (“Essentially, this means to see absence not as an existing ‘thing’ in itself but as something that is made to exist through relations that give absence matter.”).

<sup>76</sup> Elizabeth A. Wright, *Rhetorical Spaces in Memorial Places: The Cemetery as a Rhetorical Memory Place/Space*, 35 *RHETORIC SOC’Y Q.* 51, 52 (2005) (“This point of crystallization and secretion is separated from the moment that is remembered, and the place comes to represent it.”).

<sup>77</sup> Wright, *supra* note 76, at 55 (“If, however, there is no public place into whose boundaries a rhetorical memory space is deemed appropriate, then the memory . . . can disappear.”).

<sup>78</sup> *Id.* (noting “the need to create visual places for memories, [because] what is remembered is directly connected to where it is remembered”).

<sup>79</sup> *Id.* at 70 (“[W]ith a concrete space commemorating these human beings, their stories are much more difficult to forget.”); see also *id.* (“Another reason the materiality of places makes a grave so powerful as a rhetorical memory space is that the memorial creates a kind of framework for our knowledge. We can’t remember everything. The material helps us remember . . .”).

<sup>80</sup> Robert M. Bednar, *Materialising Memory: The Public Lives of Roadside Crash Shrines*, 1 *MEMORY CONNECTION* 18, 19 (2011) [hereinafter Bednar, *Materialising Memory*].

<sup>81</sup> *Id.* at 25.

objects of the memorial decay and erode in the public space.<sup>82</sup> The memorial is thus allowed to grow old and decompose in a way the deceased could not.<sup>83</sup>

Memory thus needs a locus. And these memorials provide the memory place for the bereaved. This explains why the bereaved need a place to remember and connect with the deceased, but it does not fully account for why this place is along the public roadway and not in the cemetery. This private need can create conflict with the public interest.<sup>84</sup> This use of public space to make sanctified private place is not without contention. Part II discusses the tensions caused by roadside memorial crosses.

## II. Contested Use of S/p[l]ace<sup>85</sup>

To recognize someone as absent is to save that person from oblivion. We cannot remember everything.<sup>86</sup> That which becomes remembered is selective.<sup>87</sup> But who is remembered, whose absence we allow to be made present, inevitably invokes socio-political questions. These memorials on public space, according to Professor Maddrell, can “offend others’ sense of landscape aesthetics, religious or secular entitlement, and even ontological security, which causes debate and often prompts intervention and management by landowners, local authorities and planning agencies.”<sup>88</sup> There can be a tension over the proper use of public space.<sup>89</sup> Whose absences get to be made present?<sup>90</sup> How long can the absence be made present? Who decides? While the public is generally deferential to extant

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<sup>82</sup> Meier, *supra* note 72, at 424.

<sup>83</sup> Bednar, *Materialising Memory*, *supra* note 80, at 26-27.

<sup>84</sup> Maddrell, *Living With The Deceased*, *supra* note 12, at 517 (“The desire to acknowledge the absent dead and the paradoxical relationship of absence-presence in public spaces has generated multiple, sometimes colliding and competing, meanings and values in the landscape.”).

<sup>85</sup> The slash and bracket purposefully highlights the relatedness of these concepts. See Rita L. Irwin et al., *The Rhizomatic Relations of A/r/topography*, 48 *STUD. ART EDUC.* 70, 70, n.1 (2006) (“The name itself exemplifies these features by setting art and graphy, and the identities of artist, researchers, and teacher (a/r/t), in continuous relations.”); Wright, *supra* note 76, at 70 (exploring the rhetoric of the cemetery as “s/p[l]ace”).

<sup>86</sup> Wright, *supra* note 76, at 70.

<sup>87</sup> Meier, *supra* note 72, at 425 (“Memories are very selective and much is left in oblivion. That which is remembered as absent becomes present in a different way—it is being sought out at the borders of intentionality and is thus awoken from oblivion.”).

<sup>88</sup> Maddrell, *Living With The Deceased*, *supra* note 12, at 511.

<sup>89</sup> *Id.* at 510 (“Inevitably, where this is materialized through increased incursion into public space, other users of that same space may resent and contest its appropriation and inscription as site of material and performative remembrance.”).

<sup>90</sup> For example, the drunk driver who is simultaneously killed in the car crash is not memorialized in the same way on the public roadway. In some states, these deceased are expressly forbidden from receiving official commemoration along the roadway. See, e.g., TEX. DEP’T OF TRANSP., USE OF RIGHT OF WAY BY OTHERS MANUAL 3-21 (2005), available at <http://onlinemanuals.txdot.gov/txdotmanuals/use/use.pdf> (“A person is not eligible for a memorial sign if the victim was operating a vehicle involved in the crash and was documented to be impaired at the time of the crash.”).

roadside memorials,<sup>91</sup> some in the community voice objections. Common objections to roadside crosses are based on unwanted vicarious trauma, traffic safety hazards, and Establishment Clause concerns. These concerns are outlined in seriatim below, and Part III addresses the visual arguments made by ventilating private grief upon public spaces.

Roadside memorials can be an unwanted intrusion on the public space of the non-grieving.<sup>92</sup> Some in the community resist the intrusion of private grief on their daily commutes.<sup>93</sup> As a Canadian resident argued, “there comes a time to let go, a time to move on. To place a shrine at the place where someone was killed celebrates a death rather than honouring a life. It prolongs the suffering and delays the acceptance of what is. I don’t believe it soothes anyone’s soul.”<sup>94</sup> But Paul McMurtry, a Massachusetts legislator who proposed a bill to regulate roadside memorials, noted that the bereaved often have a hard time letting go of the memorial, either out of a sense of loyalty and duty to keep the memorial alive or out of a sense of guilt for taking it down.<sup>95</sup>

Others in the community can come to oppose this use of public space, especially for memorials that have remained beyond an acceptable mourning period.<sup>96</sup> Contesting and inverting our sense of reality, these memorials can serve as unwelcome proof of the fragility of life and reminders of our own mortality.<sup>97</sup> Modern culture often refuses to fully account for the fragility of life.<sup>98</sup> For centuries, the public attitude toward death was “neither fear nor despair, half-way between passive resignation and mystical trust.”<sup>99</sup> But a marked shift in attitude can be traced to the beginning of the last century.<sup>100</sup> French scholar

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<sup>91</sup> Collins & Rhine, *supra* note 33, at 231 (“With a few vocal exceptions, the public seems either to respect the right of families and friends to act in this fashion, or to be willing to ignore the issue.”); *see also* Richard Tay, *Drivers’ Perceptions and Reactions to Roadside Memorials*, 41 ACCIDENT ANALYSIS & PREVENTION 663, 666 (2009).

<sup>92</sup> Clark & Franzmann, *supra* note 14, at 587.

<sup>93</sup> *See, e.g.*, Reid & Reid, *supra* note 33, at 353.

<sup>94</sup> Bly, *supra* note 32.

<sup>95</sup> DeMarco, *supra* note 15.

<sup>96</sup> *See, e.g.*, Selina Steele, *Hard Road—Vandals Target Memorials*, SUNDAY MAIL (Austl.), Feb. 11, 2001, at 7. A note was left on the memorial site explaining why the memorial was taken down: “The community of Ormeau [has] endured this memorial site for one year and two months and we feel that is by far long enough.” *Id.*

<sup>97</sup> *See* Hartig & Dunn, *supra* note 40, at 10 (“Motorists are jolted by these intrusions of the sacred into everyday space, and as they flash by they serve as reminders of mortality and of the real possibility of motor vehicle accidents.”); *see also* Joel Slemrod, *Thanatology & Economics: The Behavioral Economics of Death*, 93 AM. ECON. REV. 371, 374 (2003) (“[P]eople forgo a significant amount of tax saving by postponing passing along their wealth to the next generation [and] [t]his behavior is consistent with an unwillingness to face up to one’s mortality.”).

<sup>98</sup> *See* ERNEST BECKER, *THE DENIAL OF DEATH* 11-24 (1973) (discussing death anxiety and the prevalence of denial of individual finitude).

<sup>99</sup> PHILIPPE ARIÈS, *WESTERN ATTITUDES TOWARD DEATH: FROM THE MIDDLE AGES TO THE PRESENT* 103 (Patricia M. Ranum trans., 1974).

<sup>100</sup> *Id.* at 94. It seems that the modern attitude toward death, that is to say the interdiction of death in order to preserve happiness, was born in the United States around the beginning of the twentieth century.

Philippe Ariès argued that this modern interdict on death is based on the need to preserve and maintain happiness.<sup>101</sup> He suggested that there is an implied social duty to maintain collective happiness and to avoid upsetting that happiness by showing signs of sadness.<sup>102</sup> Roadside memorials thus serve as powerful and unpleasant reminders of death and can cause vicarious trauma to other drivers who are forced to experience the memorial.

These memorials can cause vicarious trauma not only to other drivers, but also to those in the community who had a direct experience with the accident, either as neighboring residents or as first responders. It is not uncommon for law enforcement and other professionals to experience vicarious trauma or radiated distress from traumatic events.<sup>103</sup> Similarly, for neighbors who are forced to regularly confront the memorial, it can be a painful reminder.<sup>104</sup>

In addition to foisting “an intrusive traumatic memory” on the public,<sup>105</sup> these roadside memorials raise traffic safety concerns. When surveyed, seventy percent of state transportation officials said roadside memorials were considered a safety hazard in their state.<sup>106</sup> The memorial mementos can interfere with road maintenance and mowing operations.<sup>107</sup> And memorials can be a dangerous distraction to other drivers.<sup>108</sup> As an illustration of this danger, a young woman in Texas was struck and killed by a car while visiting the roadside memorial for her

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<sup>101</sup> *Id.* at 86-87.

<sup>102</sup> *Id.* at 93-94.

<sup>103</sup> See, e.g., April Naturale, *Secondary Traumatic Stress in Social Workers Responding to Disasters: Reports from the Field*, 35 CLINICAL SOC. WORK J. 173, 173-81 (2007) (discussing three case histories of social workers responding to disasters, the course of their secondary traumatic stress responses, and their struggle to overcome the psychological adversity they faced); Kimberly Strom-Gottfried & Nikki D. Mowbray, *Who Heals the Helper? Facilitating the Social Worker's Grief*, 87 FAMILIES SOC'Y 9, 9-15 (2006) (discussing trauma of loss experienced by care givers and other professionals); Lynn A. Tovar, *Vicarious Traumatization and Spirituality in Law Enforcement*, FBI LAW ENFORCEMENT BULL., July 2011, at 16, 16-21 (investigating how vicarious trauma manifests in law enforcement officials).

<sup>104</sup> See, e.g., Nick Grabbe, *Residents Condemn Roadside Gravestone*, PLYMOUTH EVENING HERALD (Aug. 30, 2008), available at 2008 WLNR 16446088 (“Since the appearance of the inscribed headstone we have received many complaints from local residents who find it very distressing to be reminded of this young man’s tragic death when they pass every day.”) (internal quotations omitted).

<sup>105</sup> Bednar, *Denying Denial*, *supra* note 50, at 134.

<sup>106</sup> Dickinson & Hoffmann, *supra* note 13, at 161.

<sup>107</sup> Everett, *Crossroads*, *supra* note 35, at 57 (“The [roadside memorial] assemblages have become so numerous as to render routine roadway maintenance difficult.”); Collins & Rhine, *supra* note 33, at 236 (“Wood or metal crosses, stones, bits of decorative fencing, even votive candles and teddy bears interfere with normal [road maintenance] procedures.”).

<sup>108</sup> See, e.g., *Friends Upset WSDOT Removed Roadside Memorial*, KING5.COM (Apr. 2, 2012, 8:10 AM), <http://www.king5.com/news/local/Friends-upset-WSDOT-removed-roadside-memorial-145784275.html> (“WSDOT said it was becoming a hazard because other drivers were slowing down to look at it [the memorial cross] along Interstate 405.”); see also Everett, *Crossroads*, *supra* note 35, at 57 (“Additionally, TxDOT [Texas Department of Transportation] officials fear they are dangerously distracting to drivers.”).

cousin.<sup>109</sup> Another example involved a child who was killed by a driver distracted by a memorial for two young pedestrians killed earlier at the same site.<sup>110</sup> And, in Australia, a young woman died after she slowed down to look at a recently erected roadside memorial and her car was hit by a truck.<sup>111</sup> In Arizona, a transportation department spokesperson noted that of the 4000 rear-end collisions that occurred in a year, “a troubling number involved drivers who stopped to view roadside memorials.”<sup>112</sup>

While these memorials can be a safety risk, most government officials are reluctant to remove them.<sup>113</sup> As one researcher observed, “These memorials are often left untouched by transportation officials because they are respected as sacred places even though they violate law.”<sup>114</sup> Nearly half of the states have adopted some policy regarding the placement of roadside memorials.<sup>115</sup> Policies vary widely: some states expressly permit private markers; a few states allow only state-sponsored markers; a number of states allow local governments to regulate them; and other states expressly prohibit roadside markers.<sup>116</sup> In states where memorials along the roadways are not permitted, state and local officials have an unwritten policy of allowing a memorial to stand unless a complaint is made<sup>117</sup> or it is perceived to be a traffic hazard.<sup>118</sup> While state transportation

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<sup>109</sup> Reid & Reid, *supra* note 33, at 352-53.

<sup>110</sup> Ross, *supra* note 33, at 50, 52.

<sup>111</sup> Daniella Miletic, *Roadside Tributes Blamed for Fatal Crash*, AGE (Austl.) (July 11, 2009), <http://www.theage.com.au/national/roadside-tributes-blamed-for-fatal-crash-20090710-dg3r.html>.

<sup>112</sup> Collins & Rhine, *supra* note 33, at 238.

<sup>113</sup> Rebecca M. Kennerly, *Cultural Performance of Roadside Shrines: A Poststructural Postmodern Ethnography* 118 (May 4, 2005) (unpublished Ph.D. dissertation, Louisiana State University) (on file with author).

<sup>114</sup> Briggs, *supra* note 34, at 5.

<sup>115</sup> Dickinson & Hoffmann, *supra* note 13, at 158 (identifying that twenty-three states, or 46%, have adopted a policy).

<sup>116</sup> See Amanda Reid, *supra* note 23, at 149-55; see also Briggs, *supra* note 34, at 19-20 (“Because of the regional variation in roadside memorial policies, roadside memorial construction is not addressed in a uniform manner throughout the United States.”); Sharp, *supra* note 8 (“States and municipalities apply a hodge-podge of policies. The issue is often emotional: Arguments about traffic hazards and right-of-way aren’t welcome by families in mourning.”).

<sup>117</sup> Collins & Rhine, *supra* note 33, at 237; Dickinson & Hoffmann, *supra* note 13, at 161.

<sup>118</sup> Chris Burbach, *Memorials Say: We Won’t Forget Roadside Shrines Are Proliferating as Mourners Turn to a Public Way to Remember Those They Have Lost*, OMAHA WORLD-HERALD, May 25, 2002, available at 2002 WLNR 15413782; accord J.R. Ross, *States Eye Bans on Roadside Memorials: Officials Fear the Shrines Will Be a Distraction to Other Motorists and May Cause More Accidents*, GRAND RAPIDS PRESS, July 13, 2003, available at 2003 WLNR 13842930 (“Wisconsin isn’t just concerned that the memorials are a distraction for drivers whizzing by. Officials also worry about the potential safety hazard when mourners stop to visit the memorials, often just a few feet off the interstate.”); Stephanie Warsmith, *Tattered Memorials To Dead Taking Toll in Neighborhoods*, AKRON BEACON J. (Oct. 9, 2011), available at 2011 WLNR 20751801 (“The Ohio Department of Transportation doesn’t permit memorials, but allows them to remain as long as they don’t pose a hazard or draw away drivers’ attention. When the

officials “would prefer not to see them”<sup>119</sup> and “it is not anything [they] like to see proliferate,”<sup>120</sup> they are generally deferential to the grief and mourning of the bereaved.<sup>121</sup> A state police officer confirmed that “[u]sually it’s just a matter of decorum, and once some time passes to heal, it gets cleared up.”<sup>122</sup> But state officials note they generally “don’t rush out and take them down.”<sup>123</sup>

This deference and failure to remove unauthorized roadside crosses is seen by some as a failure to preserve a separation between church and state.<sup>124</sup> At a time when religious fundamentalism is fueling political instability and violence in other parts of the world, there are those who strongly seek to preserve a separation between church and state. An illustrative example of the tension over sectarian symbols on public space comes from media reports about a roadside cross in Southern California. The American Humanist Association (AHA) petitioned for the removal of a private roadside cross on city-owned property, which a grieving mother had erected nearly two years before.<sup>125</sup> The AHA sent a letter to the City of Lake Elsinore, California, arguing that because the Latin cross is a religious symbol, its placement on public property violates the Establishment Clause.<sup>126</sup> The cross was erected in May, 2012. In December, 2013, the City removed the cross after the AHA’s repeated requests for its removal. The grieving mother pleaded with the City’s officials, and the cross was replaced two days later. On December 18, 2013, the City’s officials

state does maintenance work, such as mowing, memorials in the way are removed, said Justin Chesnic, a spokesman for the department’s District 4.”).

<sup>119</sup> JoAnne Klimovich Harrop, *Roadside Shrines Help Loved Ones Deal with Tragedy*, PITTSBURGH TRIBUNE REV., July 4, 2010, available at 2010 WLNR 13421675 (quoting Jim Struzzi, spokesman for PennDOT District 11).

<sup>120</sup> Burbach, *supra* note 118 (quoting Mary Jo Hall, spokeswoman for Nebraska Roads Department).

<sup>121</sup> *Id.* (noting the transportation department understands that “people are showing their grief and going through their mourning period”); Klimovich Harrop, *supra* note 119 (“PennDOT is certainly sympathetic to the needs of the family and friends when it comes to roadside memorials” and “we appreciate what they mean to people.”).

<sup>122</sup> Erin Shannon, *How Long is Too Long for Roadside Memorials? Year-Old Memorial to Weymouth Man Killed in Abington Crash Removed by State Crew*, PATRIOT LEDGER (Oct. 9, 2012), available at 2012 WLNR 21512743 (quoting Robert Devine, Executive Officer of the Stoughton Police Department).

<sup>123</sup> Burbach, *supra* note 118 (quoting Mary Jo Hall, spokeswoman for Nebraska Roads Department).

<sup>124</sup> See Briggs, *supra* note 34, at 4 (noting that memorials are often placed on public roadways and “[b]ecause this placement blurs the distinction between church and state, a roadside memorial occasionally preludes controversy”).

<sup>125</sup> Jonathan Lloyd, Jacob Rascon & Tony Shin, *Mother Removes Cross Memorial after Dispute with Atheist Rights Group*, NBC4 LOS ANGELES (Mar. 10, 2014, 3:43 PM), <http://www.nbclausangeles.com/news/local/Lake-Elsinore-Atheists-Group-Demands-Cross-Removal-American-Humanist-Association-Devaney-Memorial-Religion-Church-State-248741091.html>.

<sup>126</sup> Letter from Monica Miller, Esq., to Lake Elsinore, California City Council Members Re: Unconstitutional Roadside Cross (Mar. 4, 2014), available at [http://americanhumanist.org/system/storage/2/12/0/5050/Lake\\_Elsinore\\_Roadside\\_Cross\\_3-4-14.pdf](http://americanhumanist.org/system/storage/2/12/0/5050/Lake_Elsinore_Roadside_Cross_3-4-14.pdf); see also Gallagher, *supra* note 25.

explained: “We are going to have to put it back because . . . [the family] is very upset” and “our solution . . . is to allow her to have it . . . until January 6.”<sup>127</sup> In February, 2014, the City extended the removal deadline to March 19, 2014. The AHA argued that the City’s selective enforcement of its signage ordinance and its display of the Latin cross on government property violates both the California and the U.S. Constitutions.<sup>128</sup> The City ordered the cross’s removal, and the mother told the media that by removing the cross, “[i]t’s like I’m losing my son again, pretty much.”<sup>129</sup>

The media coverage of the City of Lake Elsinore cross highlighted strong opinions on all sides of the story. Scholars confirm that “enforcement efforts become a public relations disaster, especially if memorial builders choose to take their plight to the public via the media.”<sup>130</sup> The next Parts explore the visual argument of memorializing along public roadways and the rhetorical effect of employing a Latin cross.

### III. The Visual Argument

Visual rhetoric explores the way symbols structure and influence our perception of reality.<sup>131</sup> Artifacts and architecture function rhetorically.<sup>132</sup> Artifacts on the land tell a story about the peoples who erected them, and specifically they tell a story about their memory, identity, and history.<sup>133</sup> The

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<sup>127</sup> Miller, *supra* note 126.

<sup>128</sup> *Id.*

<sup>129</sup> Lloyd, Rascon & Shin, *supra* note 125.

<sup>130</sup> Collins & Rhine, *supra* note 33, at 226.

<sup>131</sup> See generally J. Anthony Blair, *The Rhetoric of Visual Arguments*, in *DEFINING VISUAL RHETORICS* 41, 41-62 (Charles A. Hill & Marguerite Helmers eds., 2004) (arguing that visual arguments possess evocative power far superior to their print or spoken counterparts); Charles A. Hill, *The Psychology of Rhetorical Images*, in *DEFINING VISUAL RHETORICS* 25, 25-40 (Charles A. Hill & Marguerite Helmers eds., 2004) (describing “presence” as the extent to which a concept remains in the viewer’s consciousness and how that presence can be magnified by the use of visual images).

<sup>132</sup> Professor Darryl Hattenhauer argues “[a]rchitecture not only communicates, but also communicates rhetorically.” Darryl Hattenhauer, *The Rhetoric of Architecture: A Semiotic Approach*, 32 *COMM. QUARTERLY* 71, 71 (1984) [hereinafter Hattenhauer, *The Rhetoric of Architecture*]. A structure’s shape can convey meaning, like a throne which is “used more to communicate status than as a comfortable place to sit,” and purpose, like a barber pole, a church steeple, or a skyscraper. *Id.* at 73. Professor Donald Ragsdale agrees that some structures, like churches and museums, “can and do function persuasively.” J. Donald Ragsdale, *The Idea of Structures as Visual Persuasion*, in *STRUCTURES AS ARGUMENT: THE VISUAL PERSUASIVENESS OF MUSEUMS AND PLACES OF WORSHIP* 1, 8 (J. Donald Ragsdale ed., 2009). He argues that “[n]ot to see buildings, and of course museums, for their persuasive function is to miss a crucial dimension of cultural experience.” J. Donald Ragsdale et al., *European Museums as Visual Persuasion: A Typological Approach*, 16 *INTERCULTURAL COMM. STUD.* 145, 146 (2007).

<sup>133</sup> Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 *UTAH L. REV.* 1, 4-5 (2013) (“[C]ommunities mold their surroundings to reflect their worldview, and the physical durability of the landscape then carries those meanings forward and influences how future generations view events that confront them.”); accord Maoz Azaryahu & Kenneth E. Foote, *Historical Space as*

public landscape functions as a palimpsest on which cultural overwritings and erasures are evident.<sup>134</sup>

The decision to erect one artifact rather than another suggests cultural and political priorities.<sup>135</sup> Typically, the elites get to decide what story is told and which historical event gets memorialized.<sup>136</sup> But private roadside memorials are more democratic, allowing a greater representation of women, children, and minorities in public memorial culture.<sup>137</sup>

To the extent a roadside memorial is performative and, to the extent it is intended to be seen and experienced by the public, it is rhetorical. Memorials can function both as performative artifacts—which are intended to be seen and experienced by the public—and persuasive symbols.<sup>138</sup> On the one hand, roadside memorials function as epideictic rhetoric to praise and venerate the dead.<sup>139</sup> On the other hand, the symbolism and placement also send a message. Rather than being a merely *passive* religious symbol,<sup>140</sup> the roadside crosses make a visual argument.<sup>141</sup>

There is a personal and private dimension to these memorials, but there is also a public nature, which makes them rhetorical.<sup>142</sup> Roadside memorials are

*Narrative Medium: On the Configuration of Spatial Narratives of Time at Historical Sites*, 73 GEOJOURNAL 179, 179-83 (2008).

<sup>134</sup> MIKE CRANG, CULTURAL GEOGRAPHY 22 (David Bell & Stephen Wynn Williams eds., 1998); Briggs, *supra* note 34, at 2.

<sup>135</sup> Clowney, *supra* note 133, at 4 (“The landscape, in effect, becomes our ‘unwitting autobiography.’”).

<sup>136</sup> *Id.* at 5 (“[T]he built environment is shaped by the tastes of government leaders and ruling elites—the only groups with sufficient resources to organize costly building projects and install permanent memorials on the land.”).

<sup>137</sup> Maddrell, *Living With The Deceased*, *supra* note 12, at 509-10.

<sup>138</sup> Visual representations from advertisements to architecture aim to persuade viewers. See, e.g., Anna Banks, *Visual Persuasion: The Role of Images in Advertising*, 84 Q. J. SPEECH 125 (1998); Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, 34 J. ADVERTISING 7, 7-20 (2005); Joan Meyers-Levy & Prashant Malaviya, *Consumers’ Processing of Persuasive Advertisements: An Integrative Framework of Persuasion Theories*, 63 J. MARKETING 45, 45-60 (1999). From Gothic cathedrals to shopping malls, architecture seeks to persuade us. See, e.g., Hattenhauer, *The Rhetoric of Architecture*, *supra* note 132, at 71; J. Donald Ragsdale, *The English Cathedral: Architecture as Visual Persuasion*, 6 INT’L J. ARTS SOC’Y 259, 259-78 (2012).

<sup>139</sup> Cf. J. Donald Ragsdale, *Thinking Beyond Buildings: Monuments and Cemetery Stones as Visual Epideictic*, in STRUCTURES AS ARGUMENT: THE VISUAL PERSUASIVENESS OF MUSEUMS AND PLACES OF WORSHIP 102, 102-10 (J. Donald Ragsdale ed., 2009) (asserting that symbolism and placement in visual memorials together make a nonverbal argument about the practice of tribute).

<sup>140</sup> See Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821 (2014) (arguing against the passivity of religious symbols in their communicative effect).

<sup>141</sup> GILLIAN ROSE, *Understanding the Social Effects of Visual Materials*, in VISUAL METHODOLOGIES: AN INTRODUCTION TO RESEARCHING WITH VISUAL MATERIALS 1-3 (3d ed. 2011) (noting the rise in importance of the visual in the social life of contemporary Western culture).

<sup>142</sup> See David S. Birdsell & Leo Groarke, *Toward a Theory of Visual Argument*, 33 ARGUMENTATION & ADVOC., Summer 1996, at 1-10.

irreducibly personal and are created for a variety of reasons. Yet as a growing phenomenon, they are reflections of a broader social and political need.<sup>143</sup> There are other ways the bereaved could memorialize a loved one. They could commemorate and celebrate their memory at a cemetery, create a private shrine at home, put a memorial decal on their car, or get a tattoo in remembrance.<sup>144</sup> But, when public space is marked in a public way to commemorate private loss and anguish, there is a rhetorical effect.

At a minimum, an individual roadside memorial makes a twofold argument. First, that someone is absent, they are missed, and they are remembered at this place. And second, the memorial maker feels compelled and justified in memorializing in this way. The implied argument is that other rituals and other avenues for expression are inadequate in some way. And as a phenomenon and collectively emplaced along the roadways, these roadside crosses make other visual arguments. I will explore each of these arguments in turn.

As discussed above, a loved one may be so deeply missed that, to maintain a continuing bond, their memory needs a locus. The cross and the bricolage of the memorial, like flowers, stuffed animals, candles, photographs, religious items, and handwritten notes, can come to symbolize the deceased.<sup>145</sup> The cross and the mementos can also come to represent the mourner's relationship with the deceased.<sup>146</sup> Mourners can maintain a relationship with the deceased through these objects. And maintaining the memorial helps to maintain a bond with the deceased.<sup>147</sup> Continuing these bonds with the deceased during the grieving process can lead to a sense of control over events and feelings, and eventually closure of the process.<sup>148</sup> But why use public space as the focus? Why not at home or at a cemetery?

The visual argument is that the memorial maker is compelled to create a shrine on that place—the place where a loved one died. The last alive place

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<sup>143</sup> See ROSE, *supra* note 141, at 1-3; see also J. Anthony Blair, *Argumentation as Rational Persuasion*, 26 ARGUMENTATION 71, 71 (2012) (noting persuasion, argumentation, and rationality are “slippery terms”); Emilie Cameron, *New Geographies of Story and Storytelling*, 36 PROGRESS IN HUMAN GEOGRAPHY 573, 574 (2012) (“Stories express something irreducibly particular and personal, and yet they can be received as expressions of broader social and political context, and their telling can move, affect, and produce collectivities.”); Daniel J. O’Keefe, *Conviction, Persuasion, and Argumentation: Untangling the Ends and Means of Influence*, 26 ARGUMENTATION 19, 20 (2012) (“There is no correct (or universally-endorsed) definition of either ‘persuasion’ or ‘argumentation.’”).

<sup>144</sup> See Maddrell, *Living With The Deceased*, *supra* note 12, at 502 (discussing the “mobility of ‘travelling memorials’, such as tattoos, t-shirts and bumper stickers, which carry their message of remembrance through both landscape and society”).

<sup>145</sup> See, e.g., Collins & Rhine, *supra* note 33, at 230; Dickinson & Hoffmann, *supra* note 13, at 154; Holly Everett, *Roadside Crosses and Memorial Complexes in Texas*, 111 FOLKLORE 91, 91-92 (2000) [hereinafter Everett, *Roadside Crosses*].

<sup>146</sup> Bronna D. Romanoff & Marion Terenzio, *Rituals and the Grieving Process*, 22 DEATH STUD. 697, 705 (1998).

<sup>147</sup> See Collins & Rhine, *supra* note 33, at 234; Bronna D. Romanoff & Marion Terenzio, *Rituals and the Grieving Process*, 22 DEATH STUD. 697, 707 (1998).

<sup>148</sup> Romanoff & Terenzio, *supra* note 147, at 706.

offers the bereaved meaning and purpose that is not available in the cemetery. The bereaved have shown a willingness to construct these memorials wherever the loved one was last alive.<sup>149</sup> What was previously undifferentiated public roadway space is now a deeply meaningful place to the bereaved. The last alive place is sacred, made so by the spilled blood of a loved one, whereas the cemetery is a foreign, meaningless, and unconnected space. Friends and family often make great effort to identify the last alive place, using clues like blood stains and tire tracks on the ground where a vehicle stopped.<sup>150</sup>

In addition to maintaining a bond with the deceased and celebrating their life and memory, the public memorial is an implicit critique against the adequacy of the other bereavement rituals. It is a tacit critique against modern death practices, which have largely divorced the bereaved from any meaningful participation in dying and death. In contemporary western society, death is “highly managed and regulated,” which, according to Professor Gibson, creates a “taken-for-granted attitude that death will be largely absent and invisible in most everyday environments.”<sup>151</sup> With people living longer, healthier lives, modern medical advances have made death “culturally invisible.”<sup>152</sup> Death is handled by the professionals: law enforcement officers, emergency medical technicians, doctors, coroners, funeral directors, and ministers.<sup>153</sup> Death is not an integrated part of life. It is sequestered within institutions of death.<sup>154</sup> And, consequently, we are less accustomed to death. A sudden, unexpected death often leaves the bereaved traumatized and shocked.<sup>155</sup>

Death has been outsourced to professionals, and the dead have been spatially and socially marginalized. There is a perception that a cemetery is a marginalized place that is unimportant, ignored, and populated by gravestones “read only by the sun.”<sup>156</sup> As a devalued and forgotten space, the cemetery is not satisfying for some bereaved.<sup>157</sup> Moreover, contemporary grieving rituals may be inadequate when a death is sudden, unanticipated, or violent, or is the death of a child.<sup>158</sup> For these bereaved, new rituals may be necessary to aid in the grieving process. The new roadside cross ritual is often in addition to, and not instead of,

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<sup>149</sup> Everett, *Roadside Crosses*, *supra* note 145, at 91 (“Shrines are erected on busy street corners adjacent to megastores and fast food restaurants, in the medians of multilane roadways and freeways, and on private property.”).

<sup>150</sup> Collins & Rhine, *supra* note 33, at 227-28.

<sup>151</sup> Gibson, *supra* note 10, at 146.

<sup>152</sup> DAVID W. MOLLER, *CONFRONTING DEATH: VALUES, INSTITUTIONS, AND HUMAN MORTALITY* 112 (1996); Howard E. Freeman et al., *New Dimensions of Dying*, in *THE DYING PATIENT* xvi (Orville G. Brim, Jr. et al. eds., 1981) (“[W]hereas half the population used to die before the age of 40, half now live beyond the age of 70.”).

<sup>153</sup> Collins & Rhine, *supra* note 33, at 234.

<sup>154</sup> JACK B. KAMERMAN, *DEATH IN THE MIDST OF LIFE: SOCIAL AND CULTURAL INFLUENCES ON DEATH, GRIEF AND MOURNING* 8 (1988).

<sup>155</sup> Haney et al., *supra* note 14, at 169; Keith Suter, *Roadside Memorials: Sacred Places in a Secular Era*, 292 *CONTEMPORARY REV.* 51, 57 (2010).

<sup>156</sup> See Wright, *supra* note 76, at 61.

<sup>157</sup> Maddrell, *Living with the Deceased*, *supra* note 12, at 506.

<sup>158</sup> Romanoff & Terenzio, *supra* note 147, at 704 (describing a death that “challenges core assumptive structures”).

traditional funerary rituals.<sup>159</sup> The visual argument of this phenomenon is that the traditional rites, while often retained, are not fully satisfactory.

Roadside crosses are multivocal. Individually, roadside crosses make the visual argument of remembrance and loss, of continuing bonds, of the inadequacy of contemporary rituals, of religious faith, and perhaps of quasi-secular, amorphous spirituality.<sup>160</sup> Collectively, roadside crosses can make a different argument. A multiplicity of crosses along the roadway can create new meaning.<sup>161</sup> Modern transportation and the public roadways are not as safe as we may think. Notwithstanding the fact that more than 30,000 traffic fatalities occur each year,<sup>162</sup> the public generally perceives driving to be a safe activity; thus, traffic fatalities are unexpected and shocking.<sup>163</sup>

Transportation officials seem to recognize the visual argument made by a string of roadside crosses.<sup>164</sup> Pete Rahn, Cabinet Secretary of the New Mexico Highway and Transportation Department, acknowledged this hazardous road argument: “The number of crosses said a lot about that road.”<sup>165</sup> The road in question was a two-lane highway in high-mountain terrain, which was made dangerous when combined with truck traffic, fast cars, and alcohol. Transportation officials recognize a memorial’s visual warning to drive safely, and some states leverage this meaning and use standardized signs to promote this visual argument.<sup>166</sup> Along highways, the collection of roadside crosses poignantly conveys a message about road safety. Yet a multiplicity of crosses

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<sup>159</sup> Haney et al., *supra* note 14, at 161.

<sup>160</sup> Clark & Franzmann, *supra* note 14, at 591; Everett, *Roadside Crosses*, *supra* note 145, at 91.

<sup>161</sup> See Carole Blair & Neil Michel, *Commemorating in the Theme Park Zone: Reading the Astronauts Memorial*, in *AT THE INTERSECTION: CULTURAL STUDIES AND RHETORICAL STUDIES* 29, 36 (Thomas Rostech ed., 1999).

<sup>162</sup> The National Highway Traffic Safety Administration reported 33,561 traffic fatalities for 2012 and 32,479 traffic fatalities for 2011. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., FARS DATA TABLES, SUMMARY, *available at* <http://www-fars.nhtsa.dot.gov/Main/index.aspx> (showing motor vehicle crashes and fatalities from 1994 to 2012).

<sup>163</sup> See Richard Tay et al., *Effects of Roadside Memorials on Traffic Flow*, 43 ACCIDENT ANALYSIS & PREVENTION 483, 483 (2011); Tay, *supra* note 91, at 663.

<sup>164</sup> Leslie Linthicum, *Roadside Memorials Carefully Returned*, ALBUQUERQUE J., Dec. 9, 2001, *available at* 2001 WLNR 2190021 (“‘The number of crosses said a lot about that road,’ said Pete Rahn, secretary of the state Highway and Transportation Department. It was a dangerous two-lane highway, especially around Cuba, where high-mountain terrain, truck traffic, fast cars and often alcohol combined to cause accidents.”).

<sup>165</sup> *Id.*

<sup>166</sup> See, e.g., FLA. DEP’T. OF TRANSP., WELCOME TO THE HIGHWAY SAFETY MEMORIAL, MARKER PROGRAM (2014), *available at* <http://www.dot.state.fl.us/statemaintenanceoffice/memorial%20markers.shtm>; WYOMING DEP’T OF TRANSP., ROADSIDE MEMORIAL PROGRAM (2003), *available at* <http://www.dot.state.wy.us/files/content/sites/wydot/files/shared/Public%20Affairs/Roadside%20Memorial%20Program%20Brochure.pdf>; COLO. DEP’T OF TRANSP., SAFETY & TRAFFIC ENG’G BRANCH, ROADSIDE MEMORIAL SIGNAGE PROGRAM CRITERIA (2009), *available at* <http://www.coloradodot.info/library/forms/cdot1314.pdf>; see also Reid, *supra* note 116, at 151-52.

along the roadway may also send a message of religious preference. Part IV explores Establishment Clause concerns raised by these roadside crosses.

#### IV. The Reasonable Observer

Some states expressly permit private roadside memorials, including the Latin cross.<sup>167</sup> And even where private roadside memorials are not permitted, state officials often fail to remove them.<sup>168</sup> One researcher observed: “In some jurisdictions, even homemade garage sale and political campaign signs are more heavily regulated and scrutinized by planning and zoning officials than roadside memorials.”<sup>169</sup> Does use of a Latin cross along the roadway make the cross secular, or does it make the memorial sectarian?<sup>170</sup> What does the reasonable observer conclude?<sup>171</sup>

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion . . . .”<sup>172</sup> The “touchstone” for an Establishment Clause analysis is “governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>173</sup> The Court’s test for governmental neutrality set forth in *Lemon v. Kurtzman*,<sup>174</sup> while criticized,<sup>175</sup> is still the dominant approach used by courts in religious symbol cases.<sup>176</sup> The original formulation of the *Lemon* test is a three-prong analysis: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government

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<sup>167</sup> See, e.g., TEX. DEP’T OF TRANSP., USE OF RIGHT OF WAY BY OTHERS MANUAL, 3-23 (2005), available at <http://onlinemanuals.txdot.gov/txdotmanuals/use/use.pdf>.

<sup>168</sup> See, e.g., Hannah Dreier, *East Contra Costa Agency to Crack Down on Roadside Memorials*, CONTRA COSTA TIMES (Apr. 15, 2011, 2:52 PM), [http://www.insidebayarea.com/ci\\_17858129](http://www.insidebayarea.com/ci_17858129) (“Roadside memorials technically violate the law because they are on public property, but they are often untouched because of their sensitive nature.”).

<sup>169</sup> Briggs, *supra* note 34, at 4.

<sup>170</sup> Cf. *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (Stevens J., dissenting) (arguing that a Latin cross is always a sectarian symbol even when unadorned and used in a war memorial).

<sup>171</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (asking how the purpose and effect prongs of the *Lemon* test would appear to a reasonable observer).

<sup>172</sup> U.S. CONST. amend. I.

<sup>173</sup> *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Yet governmental neutrality “may not mandate a civic religion that stifles any but the most generic reference to the sacred.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014).

<sup>174</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>175</sup> See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 686-87 (2005) (plurality opinion) (noting the *Lemon* test was “not useful in dealing with the . . . passive monument”).

<sup>176</sup> *Lemon*, 403 U.S. at 612-13 (as modified by *McCreary Cnty.*, 545 U.S. at 861-66; *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989), abrogated on other grounds by *Town of Greece*, 134 S. Ct. at 1811; *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997)).

entanglement with religion.”<sup>177</sup> The first prong of the analysis examines the state’s purpose, actually and as perceived by a reasonable observer, in allowing roadside crosses to remain on public property.<sup>178</sup> The second prong examines whether a reasonable observer would perceive a message of state endorsement or favoritism for or against particular beliefs.<sup>179</sup> The endorsement inquiry restricts the state from making “a person’s religious beliefs relevant to his or her standing in the political community,”<sup>180</sup> or from sending “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>181</sup> This endorsement test enlists the aid of a hypothetical objective observer “who knows all of the pertinent facts and circumstances surrounding the symbol and its placement.”<sup>182</sup> And the third prong examines whether allowing roadside crosses to remain on public property fosters excessive state entanglement with religion.<sup>183</sup>

Recently, the courts have considered Establishment Clause challenges to religious symbols like the Ten Commandments and the Latin cross on public property. In 2005, the Supreme Court held the display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause.<sup>184</sup> In *McCreary County v. ACLU of Kentucky*, two Kentucky counties prominently displayed large, gold-framed copies of an abridged text of the King James Version of the Decalogue in courthouse hallways.<sup>185</sup> After the lawsuits were filed, the displays were supplemented with secular historical and legal documents, like the Star Spangled Banner’s lyrics and the Declaration of Independence.<sup>186</sup> According to the counties, the purpose of displaying the Ten Commandments along with the other documents was to emphasize the significant role all of these texts played in the American system of law and government.<sup>187</sup> Yet, other significant documents like the Fourteenth Amendment and the original Constitution of 1787 were not included in the display.<sup>188</sup> Writing for the majority, Justice David Souter noted, “under the Establishment Clause detail is key.”<sup>189</sup> And after examining the iterations of the displays, the Court found the displays failed the secular purpose prong of the

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<sup>177</sup> *Lemon*, 403 U.S. at 612-13.

<sup>178</sup> See *McCreary Cnty.*, 545 U.S. at 863; *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>179</sup> See *Cnty. of Allegheny*, 492 U.S. at 627-28 (O’Connor, J., concurring in part and concurring in judgment).

<sup>180</sup> *Id.* at 627 (O’Connor, J., concurring in part and concurring in judgment).

<sup>181</sup> *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

<sup>182</sup> *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (Stevens, J., dissenting).

<sup>183</sup> *Id.* at 708.

<sup>184</sup> *McCreary Cnty. v. ACLU*, 545 U.S. 844, 844. Justice Souter wrote the opinion of the Court and was joined by Justices Stevens, O’Connor, Ginsburg, and Breyer.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 870-71.

<sup>188</sup> *Id.* at 872.

<sup>189</sup> *Id.* at 867.

*Lemon* test because the dominant religious nature of the Ten Commandments display was unmistakable.<sup>190</sup>

In another opinion issued the same day, a plurality of the Court held the display of a Ten Commandments monument on Texas Capitol grounds was not a violation of the Establishment Clause.<sup>191</sup> In *Van Orden v. Perry*, the plurality stated that the *Lemon* test was “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, the analysis should be driven by both the monument’s nature and the Nation’s history.”<sup>192</sup> The plurality recognized the religious significance of the Decalogue, as well as its “undeniable historical meaning,” and concluded that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”<sup>193</sup>

Justice Breyer, concurring in the judgment that the monument was not a violation of the Establishment Clause,<sup>194</sup> wrote separately to emphasize that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>195</sup> He acknowledged *Van Orden* was a “borderline case,” and in evaluating difficult borderline cases, Justice Breyer saw “no test-related substitute for the exercise of legal judgment.”<sup>196</sup> He underscored the need to “remain faithful to the underlying purposes of the [Religion] Clauses” and “take account of context and consequences measured in light of those purposes.”<sup>197</sup>

In a fact-intensive examination, Justice Breyer found the context and physical setting of the display suggested that Texas intended the “nonreligious aspects of the tablets’ message to predominate.”<sup>198</sup> The display was donated by a secular civic organization and the monument itself “prominently acknowledge[d]” its donor, which “further distance[d] the State itself from the

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<sup>190</sup> *McCreary Cnty.*, 545 U.S. at 872 (“No reasonable observer could swallow the claim that the Counties had cast off the [sectarian] objective so unmistakable in the earlier displays.”).

<sup>191</sup> *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005) (plurality opinion).

<sup>192</sup> *Id.* at 677-78. *Cf.* *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (“There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparable from the history of religion.”).

<sup>193</sup> *Van Orden*, 545 U.S. at 690. *Cf.* *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (holding unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom because of the statute’s plainly religious purpose).

<sup>194</sup> Justice Breyer’s concurrence in the judgment can be seen as the controlling opinion in *Van Orden*. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) (internal quotations omitted).

<sup>195</sup> *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

<sup>196</sup> *Id.* at 700.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 701.

religious aspect of the Commandments' message."<sup>199</sup> And the physical setting of the monument "suggest[ed] little or nothing of the sacred," and did "not readily lend itself to meditation or any other religious activity."<sup>200</sup> Finally, Justice Breyer emphasized that the monument was unchallenged for nearly forty years. This length of time suggested to him that "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, [or] primarily to promote religion over nonreligion . . . ."<sup>201</sup>

In 2009, the Supreme Court again grappled with religious symbols when a religious sect brought a Free Speech challenge to a government's refusal to display its religious monument on public property.<sup>202</sup> In rejecting the religious sect's challenge, the Court explained in *Pleasant Grove City, Utah v. Sumnum* that the Free Speech Clause has no application where the state is engaging in its own speech: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."<sup>203</sup> The Court explained that, unlike speeches and other transitory expressive acts, "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."<sup>204</sup> The Court had little reservation in concluding that this monument was government speech: "Permanent monuments displayed on public property typically represent government speech."<sup>205</sup> The Government can speak not only through its own government-financed monuments but it can also speak through privately financed monuments that a government elects to accept and display.<sup>206</sup> To the extent the government exercises selection and control over the permanent monuments that are displayed on public lands, the message from these displays is government speech, hence, subject to scrutiny under the Establishment Clause.<sup>207</sup>

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<sup>199</sup> *Id.* at 701-02.

<sup>200</sup> *Id.* at 702.

<sup>201</sup> *Id.* at 702.

<sup>202</sup> *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460 (2009).

<sup>203</sup> *Id.* at 467.

<sup>204</sup> *Id.* at 464.

<sup>205</sup> *Id.* at 470.

<sup>206</sup> *Id.* at 470-71 ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."); *cf. id.* at 485 (Souter, J., concurring in the judgment) ("I have qualms, however, about accepting the position that public monuments are government speech categorically.").

<sup>207</sup> *Id.* at 472.

Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

*Id.*

In 2010, in *Salazar v. Buono*, the Court again faced the issue of displaying a privately donated religious symbol on public land.<sup>208</sup> In 1934, members of the Veterans of Foreign Wars placed a Latin cross in the Mojave Desert to honor American soldiers who died in World War I.<sup>209</sup> The eight-foot cross was located on federal land in the Mojave National Preserve.<sup>210</sup>

The Ninth Circuit, in 2004, affirmed the district court's permanent injunction on the grounds the display violated the Establishment Clause because the Mojave cross conveyed an impression of governmental endorsement of religion.<sup>211</sup> While the Mojave cross case was pending before the lower courts, Congress, in a series of legislative enactments between 2001 and 2004, twice prohibited the use of federal funds to remove the cross,<sup>212</sup> designated the cross a national memorial,<sup>213</sup> and then transferred the one acre of land on which the Mojave cross sits to the Veterans of Foreign Wars with the requirement that if the cross ceased to be a war memorial, the land would revert to the federal government.<sup>214</sup> Petitioner challenged Congress's land transfer as a violation of the district court's original permanent injunction.<sup>215</sup> The Ninth Circuit agreed that the land transfer was a violation of the permanent injunction and affirmed the district court's order.<sup>216</sup> The Supreme Court ruled five-to-four that the land transfer did not violate the district court's original injunction. The Supreme Court remanded the case to the lower court to decide whether or not the land transfer constituted an "illicit governmental purpose."<sup>217</sup>

The *Salazar v. Buono* decision leaves unresolved many of the questions that are raised by the presence of a memorial cross on federal land.<sup>218</sup> Shortly after the *Salazar* opinion, the Tenth Circuit Court of Appeals ruled that a twelve-foot memorial cross for fallen highway patrol troopers, bearing the highway patrol's official symbol, erected on public property was an Establishment Clause violation.<sup>219</sup> The private organization that erected the memorial crosses

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<sup>208</sup> *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (Stevens, J., dissenting).

<sup>209</sup> *Id.* at 723 (Roberts, C.J., concurring).

<sup>210</sup> *Id.* at 730 (Scalia, J., concurring).

<sup>211</sup> *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004).

<sup>212</sup> Consolidated Appropriations Act, Pub. L. No. 106-554, § 133, 114 Stat. 2763A-230 (2001); Department of Defense Appropriations Act, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551 (2003).

<sup>213</sup> Dep't of Defense Appropriations Act, H.R. 2338, 107th Cong. (2002).

<sup>214</sup> Dep't of Defense Appropriations Act, § 8121(a), 16 U.S.C.A. § 410aaa-56 (2004).

<sup>215</sup> *Norton*, 364 F. Supp. 2d at 1177.

<sup>216</sup> *Buono v. Kempthorne*, 502 F.3d 1069, 1071 (9th Cir. 2007).

<sup>217</sup> *Salazar v. Buono*, 559 U.S. 700, 719 (2010).

<sup>218</sup> *Id.* at 717.

<sup>219</sup> *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1164 (10th Cir. 2010), *amended and reh'g denied*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1107 (10th Cir. 2010), *cert. denied*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011). The Supreme Court issued the *Salazar* opinion on April 28, 2010, and the Tenth Circuit panel issued its *Duncan* opinion on August 18, 2010. The Tenth Circuit delayed issuing its *Duncan* opinion, awaiting the Supreme Court's decision in *Salazar*. *Duncan*, 616 F.3d at 1152 n.5. Rehearing en banc in *Utah Highway Patrol Association v. American Atheists, Inc.* was denied on December 10, 2010.

explained that a cross was selected to memorialize the officers because “only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety.”<sup>220</sup> Although placed on public land, the memorial crosses were privately maintained and owned.<sup>221</sup> The State of Utah expressly asserted that it neither officially approved nor disapproved of the memorial markers, but it nevertheless gave the private organization permission to erect thirteen markers on public property throughout the State, two of which were erected in front of a highway patrol office.<sup>222</sup>

The Tenth Circuit used the *Lemon* test<sup>223</sup> to evaluate the Establishment Clause challenge. The court could “discern a plausible secular purpose” in erecting the memorial crosses to commemorate fallen troopers and to promote highway safety,<sup>224</sup> yet it found the memorials had the impermissible effect of conveying to a reasonable observer that the State was endorsing Christianity.<sup>225</sup> The court distinguished Christmas displays from the memorial crosses because Christmas “has been widely embraced as a secular holiday,” while “there is no evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death.”<sup>226</sup> The court also distinguished a permissible Ten Commandments display—when part of a historical presentation—from these memorial crosses because here the crosses “stand alone, adorned with the state highway patrol insignia and some information about the trooper who died there.”<sup>227</sup> Additionally, the court noted that these twelve-foot memorial crosses were ten times larger than typical roadside memorials, which were often between twelve and sixteen inches tall.<sup>228</sup> The size and location of the crosses bolstered the court’s conclusion that a reasonable observer would believe that the State was endorsing Christianity through the use of the Latin cross, which “is unequivocally a symbol of the Christian faith.”<sup>229</sup> Part V examines the message of the roadside cross to the reasonable observer.

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<sup>220</sup> *Duncan*, 616 F.3d at 1151.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at n.3.

<sup>223</sup> *Id.* at 1156 (acknowledging that while the test has been much maligned, “the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*”) (internal citations omitted). The Tenth Circuit interpreted the purpose and effect prongs of the *Lemon* test in light of Justice O’Connor’s endorsement test, which makes the “inquiry very case-specific.” *Id.* at 1157.

<sup>224</sup> *Id.* at 1157.

<sup>225</sup> *Id.* at 1160.

<sup>226</sup> *Id.* at 1161-62.

<sup>227</sup> *Id.* at 1162.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1159 (quoting *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1022 (10th Cir. 2008)).

We agree that a reasonable observer would recognize these memorial crosses as symbols of death. However, we do not agree that this nullifies their religious sectarian content because a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.

## V. Decoding the Roadside Cross

“We live in a culture of symbols.”<sup>230</sup> So how do we make sense of these symbols? How do we decode the meaning of these roadside crosses?

The well-informed observer knows that these are privately created memorials. The crosses undoubtedly speak on behalf of the private individuals who were motivated to erect them. The memorial speaks as much for the memorial maker as it does for the deceased by reflecting the maker’s image of the loved one.<sup>231</sup> But by not removing private religious displays on public property, it is unclear if a government runs the risk of endorsing a religious message.<sup>232</sup> By being allowed to remain on public property for years, with no clear expiration date, does the roadside cross cease to be purely private speech? Professor Kent Greenawalt puts it nicely: “The interesting, and constitutionally troublesome, issues arise in more ambiguous situations, in which it is unclear either whether words or symbols are religious or whether the state supports the religious message that they indisputably convey.”<sup>233</sup>

Monuments and symbols can communicate a message on behalf of more than one speaker. They speak on behalf of the donor as well as the recipient who displays it.<sup>234</sup> By affirmatively accepting a donated monument, the government is conveying a message of approval. But are roadside crosses like a donated monument? Do they speak on behalf of the creator as well as the owner of the property on which the memorial is emplaced? Temporary displays are different from permanent displays.<sup>235</sup> A temporary display does not speak on behalf of the property owner the same way a permanent display does.<sup>236</sup> The display of a cross for sixteen days on public property that was opened up for similar temporary displays, including a Christmas tree and a menorah, did not give rise to government endorsement of a religious message.<sup>237</sup> But when a roadside cross lingers for years—decades in some instances—it is unclear if it ceases to be

*Id.* at 1161. “[T]he mere fact that the cross is a *common* symbol used in roadside memorials does not mean it is a *secular* symbol.” *Id.* at 1162.

<sup>230</sup> Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2263 (2004).

<sup>231</sup> Deborah L. Wagner, *Death, Memory, and Space: A Rural Community Response to Roadside Memorials* 85 (Aug. 2008) (unpublished MA thesis, The University of Texas at San Antonio) (on file with author).

<sup>232</sup> See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 471 (2009) (“[P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.”); see also *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 (1995) (Stevens, J., dissenting) (“[S]igns and symbols are generally understood to express the [property] owner’s views.”).

<sup>233</sup> 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 69 (2008).

<sup>234</sup> See *Summum*, 555 U.S. at 469.

<sup>235</sup> *Id.* at 480 (“Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.”).

<sup>236</sup> *Id.*

<sup>237</sup> See *Pinette*, 515 U.S. at 753.

temporary, private speech or if the government begins to tacitly adopt the message. And what is the message the government may be adopting?

Monuments and symbols are polysemic. They are subject to more than one interpretation and may speak on behalf of more than one speaker. The Supreme Court acknowledged that “[e]ven when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”<sup>238</sup> A visual artifact, like a monument or a symbol, does not lend itself to a single message or meaning.<sup>239</sup> Researchers confirm that “[t]he intended meaning of a roadside memorial may well differ from the meanings that they generate for passing motorists.”<sup>240</sup> Scholars agree that the meaning ascribed to and the decoding of a symbol is done by the viewer, and is not constrained by the creator’s intended message.<sup>241</sup> Scholars who study vernacular memorials acknowledge “there is no single static reading of memorials, but practice needs to be considered in conjunction with location and form.”<sup>242</sup>

What do the intersecting horizontal and vertical lines of the cross mean? Some scholars suggest the Latin cross is not used exclusively for religious reasons in roadside memorials.<sup>243</sup> For some memorial makers, the Latin cross is used as a practical marker of death, rather than as an exclusively Christian symbol.<sup>244</sup> The cross can symbolize the human form, with the horizontal crossbar representing outstretched arms and the vertical beam representing the head and body.<sup>245</sup> In multiple person fatalities, a separate cross is often used to represent each person.<sup>246</sup>

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<sup>238</sup> *Sumnum*, 555 U.S. at 474.

<sup>239</sup> See JANET L. DOLGIN, *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 185 (1977).

<sup>240</sup> Hartig & Dunn, *supra* note 40, at 16.

<sup>241</sup> See, e.g., Sonja K. Foss, *A Rhetorical Schema for the Evaluation of Visual Imagery*, 45 COMM. STUD. 213, 216 (1994); Lawrence J. Mullen & Julie D. Fisher, *A Visual Analysis of Prescription Drug Advertising Imagery: Elaborating Foss’s Rhetorical Techniques*, 55 COMM. STUD. 185, 187 (2004).

<sup>242</sup> Maddrell, *Living with the Deceased*, *supra* note 12, at 504.

<sup>243</sup> Collins & Rhine, *supra* note 33, at 229-30 (“Here, then, appears to be a dichotomy: crosses are overwhelmingly employed in the design of memorials but apparently more as a matter of cultural integration, i.e., a reflex as opposed to an intentional or specific act of faith, at least in an institutional or denominational sense.”); see also Clark, *supra* note 13, at 35 (“The cross acts as the central element from which other elements radiate, because the cross as body forms an easy structure upon and around which to hang, display, or build other elements.”).

<sup>244</sup> See, e.g., Clark, *supra* note 13, at 34 (“The cross is a recognizable [sic] Christian symbol, but it is most likely used by memorial makers as a symbol of death. At the same time the cross physically separates a sacred place from a secular place.”); Ross, *supra* note 24, at 50, 53 (“Memorial supporters acknowledge religious concerns, but feel that the use of the cross symbol as a marker of death is so practical and universal that it essentially transcends the original Christian symbolism.”).

<sup>245</sup> See MARGARET VISSER, *GEOMETRY OF LOVE: SPACE, TIME, MYSTERY AND MEANING IN AN ORDINARY CHURCH* 32 (2000); Clark, *supra* note 13, at 35-36.

<sup>246</sup> Clark, *supra* note 13, at 35. Cf. RANDY TRAVIS, *supra* note 20 (detailing, at the start of the song, that two friends who lost their lives in a highway wreck are represented by a single roadside cross).

While memorial makers may use a cross as a symbol of death, an implied message of resurrection is often reflected in the writings left at a roadside memorial site. As one researcher observed, “Many of these writings wished the individual well and described how much he will be missed until they are reunited in the after-life.”<sup>247</sup> This underscores the religious nature of such memorials.<sup>248</sup>

The Latin cross may have a secondary meaning suggesting amorphous spirituality, but as Professor Douglas Laycock has argued, “the Christian cross has no meaning not derived from its primary religious meaning.”<sup>249</sup> The Latin cross symbolizes eternal life, redemption, and resurrection of the faithful.<sup>250</sup> Professor Laycock noted that the secondary meaning of spirituality would be meaningless without the primary symbolism of “the promise that they will rise from the dead and live forever.”<sup>251</sup> Thus, for Professor Laycock, “[t]here is no ambiguity about the primary meaning of a Christian cross.”<sup>252</sup>

To suggest memorial makers use the Latin cross reflexively as a matter of cultural integration does not deny the primarily religious meaning of the cross. Rather, it confirms the religious meaning by its common use in this setting.<sup>253</sup> And while the Latin cross may have multiple, secondary meanings, these alternative meanings are, according to Professor Claudia Haupt, “entirely dependent on the religious message.”<sup>254</sup> The message of the cross is not a generic, universal message. As the Tenth Circuit emphasized, “a memorial cross is not a generic symbol of death; it is a Christian symbol of death that signifies or memorializes the death of a Christian.”<sup>255</sup> Federal courts have generally agreed and interpreted the Latin cross as a religious symbol.<sup>256</sup>

<sup>247</sup> Briggs, *supra* note 34, at 47.

<sup>248</sup> See *id.* (noting that eighty-eight percent of memorials surveyed were “[m]emorials of death, especially religious roadside memorials of death,” and thus concluding “most roadside memorials are tied to religious meanings and assist in the grieving process since they often symbolize death”).

<sup>249</sup> Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. 1211, 1239 (2011).

<sup>250</sup> GEORGE WILLARD BENSON, *THE CROSS: ITS HISTORY AND SYMBOLISM* 23 (Dover Publ’ns 2005) (1934).

<sup>251</sup> *Id.* at 1239.

<sup>252</sup> Laycock, *supra* note 249, at 1239.

<sup>253</sup> See Briggs, *supra* note 34, at 33 (noting the majority of the memorials in Warren County “consist of crosses, typically white or brown, and wreaths,” and concluding the use of the cross was “likely a reflection of the Southern Baptist influence upon this region of Kentucky given the proportions of adherents for the county”).

<sup>254</sup> Haupt, *supra* note 140, at 861.

<sup>255</sup> *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1122 (10th Cir. 2010), *cert. denied*, *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (“[A] memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.”).

<sup>256</sup> Haupt, *supra* note 140, at 858; see also *Trunk v. City of San Diego*, 629 F.3d 1099, 1101 (9th Cir. 2011); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010), *amended and reh’g denied*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1107 (10th Cir. 2010), *cert. denied*, *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011); *Weinbaum v. Las Cruces*, 541 F.3d 1017, 1022-23 (10th Cir. 2008); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Gonzales v. N. Twp.*

*Place, Meaning, and the Visual Argument of the Roadside Cross*

“The significance of a symbol lies in what it represents,” as Justice Felix Frankfurter observed.<sup>257</sup> The Latin cross is not a pluralist, interfaith symbol. Professor Laycock has noted that the Latin cross is “unique to Christianity,” is “not common to the three Abrahamic religions,” and is “entirely dependent on the divinity of Jesus.”<sup>258</sup> He explained that the “promise of resurrection and eternal life is what makes the cross a symbol that honors deceased [Christians], and that promise necessarily depends on the divinity of Jesus.”<sup>259</sup> Jewish War Veterans confirmed that “[i]f the cross signifies death, it is because for Christians (but only for Christians), the cross evokes Christ’s death, resurrection, and promise of everlasting life. For non-Christians, the cross carries no such meanings.”<sup>260</sup>

Not only is the Latin cross not a pluralist symbol, for some it might not be a neutral symbol. To Christians, it symbolizes salvation, resurrection, and eternal heavenly reward.<sup>261</sup> But Professor Laycock has highlighted that “[a]ccording to the central Christian claim that is symbolized by the cross, non-Christians are outside the saving grace of the cross and will be eternally damned.”<sup>262</sup> Professor Laycock noted that the Latin cross is “an appropriate symbol for Christian dead because it promises resurrection and eternal life. But that promise is only to some, and it is paired with a threat of condemnation to all others.”<sup>263</sup> And he concluded: “The cross honors the dead because of—and only because of—the promise of the resurrection. It makes no sense otherwise. And the promise of the resurrection is also a threat of damnation to those who do not believe the promise.”<sup>264</sup>

Does the reasonable observer see a promise or a threat? As Justice Robert Jackson observed, “A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.”<sup>265</sup> Thus

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of Lake Cnty., Ind., 4 F.3d 1412, 1418 (7th Cir. 1993); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1983); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980).

<sup>257</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 662 (1943) (Frankfurter, J., dissenting).

<sup>258</sup> Laycock, *supra* note 249, at 1240; *accord Briggs*, *supra* note 34, at 3 (“The cross is often used by many Christians to explain the story of Jesus Christ’s death for the world’s sin . . .”).

<sup>259</sup> Laycock, *supra* note 249, at 1240.

<sup>260</sup> Brief for Jewish War Veterans of the United States of America, Inc. as Amicus Curiae Supporting Respondent at 7, *Salazar v. Buono*, 559 U.S. 700 (2010).

<sup>261</sup> Laycock, *supra* note 249, at 1240.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*; see also Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 387 n.282 (2012) (noting “certain teachings within Christian traditions repudiate other faiths and condemn those who do not accept their beliefs[,] [t]hus while the government itself may not directly denigrate those outside these traditions, it does so indirectly by approving and sponsoring those who do”).

<sup>264</sup> Laycock, *supra* note 249, at 1242.

<sup>265</sup> *Barnette*, 319 U.S. at 632-33.

in-group members decode religious symbols differently from outsiders.<sup>266</sup> Professor Kent Greenawalt has noted that while “[m]ost Christians may pass a crèche in a public space without giving it a second thought[,] it may have more significance for most Jews.”<sup>267</sup>

One’s perspective influences the social meaning derived from signs and symbols. The interpretation of a religious symbol may depend on the viewer’s religious affiliation.<sup>268</sup> And if the viewer’s religious affiliation is a socially privileged group, the viewer may be blind to their privilege.<sup>269</sup> Professor Caroline Corbin has argued that privileged group members often do not appreciate that their experiences are not the universal experience.<sup>270</sup> According to Professor Corbin, a Latin cross may be seen as universal symbol of death to American Christians for three reasons: “(a) it represents death to them; (b) as members of the dominant religion, they may have never learned the symbols that other religions do or do not use; and (c) members of dominant groups tend to universalize their subjective experience.”<sup>271</sup> Perhaps it is this blindness to Christian privilege that leads courts and commentators to argue that the Latin cross is a universal marker of death.<sup>272</sup>

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<sup>266</sup> Zick, *supra* note 230, at 2339 (“In the case of the Establishment Clause, there is nearly always a dispute regarding what message a sacred symbol conveys to ‘insiders’ and ‘outsiders.’”).

<sup>267</sup> GREENAWALT, *supra* note 233, at 89.

<sup>268</sup> Professor Haupt states:

If the observer is affiliated with a religious group whose symbol is on display, the perception is likely different than if the observer is not affiliated with that particular group or, even more problematically perhaps, not affiliated with any religion. Perception of the visual symbol, in short, arguably ‘depends on which team you favor.’

Haupt, *supra* note 140, at 856-57.

<sup>269</sup> Corbin, *supra* note 263, at 389.

<sup>270</sup> *Id.*

<sup>271</sup> Corbin, *supra* note 263, at 390; *see also* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1597 (2010) (“In order to end this blind perpetuation of Christian privilege, just as the judgment of whether a reasonable person would find a workplace environment sexually harassing should be evaluated from the viewpoint of a reasonable woman, ceremonial deism should be evaluated from the perspective of a reasonable religious outsider.”).

<sup>272</sup> Justice Antonin Scalia’s statements at oral argument in *Salazar v. Buono* were telling:

JUSTICE SCALIA: “I assume it [a Latin cross] is erected in honor of all of the war dead. It’s the-the cross is the-is the most common symbol of-of-of the resting place of the dead, and it doesn’t seem to me - what would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?”

MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.  
(Laughter.)

Yet we return to the question of what message the government may be sending by allowing roadside crosses to remain and proliferate. As the Supreme Court has emphasized, “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>273</sup> Private religious speech is generally free from Establishment Clause concerns.<sup>274</sup> These memorials are privately created, yet their persistence on public property sends a message. According to the Court, “because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.”<sup>275</sup> By allowing the roadside crosses to remain—and proliferate—on public property, does the government implicitly adopt the message of the cross?

A proliferation of roadside crosses on public property would not directly force viewers to do anything, but their ubiquitous display might indirectly pressure viewers to conform or to stay silent.<sup>276</sup> It might send a message of insiders and outsiders, of favored and disfavored, of redemption for some and

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MR. ELIASBERG: So it is the most common symbol to honor Christians.

JUSTICE SCALIA: I don’t think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that’s an outrageous conclusion.

Transcript of Oral Argument at 38-39, *Salazar v. Buono*, 559 U.S. 700 (2010) (No. 08-472).

<sup>273</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)).

<sup>274</sup> *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767, 770 (1995) (plurality opinion) (“By its terms [the Establishment] Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum.”).

<sup>275</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 471 (2009). And a government that speaks through a religious display is making a dangerous gamble. Chief Justice Roberts’ first question at the *Summum* oral argument reflected this danger:

[Y]ou’re really just picking your poison, aren’t you? I mean, the more you say that the monument is Government speech to get out of the . . . Free Speech Clause, the more it seems to me you’re walking into a trap under the Establishment Clause. If it’s Government speech, [declining to display Summum’s “Seven Aphorisms” stone monument in a public park] may not present a free speech problem, but what is the government doing speaking—supporting the Ten Commandments?”

Transcript of Oral Argument at 4, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (No. 07-665).

<sup>276</sup> See Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIGION 338, 342 (2012) (“The psychological pressure to remain respectfully silent in the face of a symbol one finds objectionable might also have a subtle coercive effect.”); see also *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (noting the pressure to maintain respectful silence during an invocation and benediction, “though subtle and indirect, can be as real as any overt compulsion”).

damnation for others. The endorsement test prohibits the government from sending “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>277</sup>

Whether the government has tacitly adopted a private religious message may turn on several factors. These factors include: (1) the size and location of the cross, (2) its tenure, and (3) whether it is a contested use of s/p[l]ace.<sup>278</sup> Size and location mattered for the Tenth Circuit in *American Atheists, Inc. v. Duncan* because the twelve-foot memorial crosses could lead a reasonable observer to conclude that the government was endorsing Christianity.<sup>279</sup> The *Duncan* court explained that the “massive size of the crosses displayed on Utah’s rights-of-way and public property unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses.”<sup>280</sup> The Ninth and Eleventh Circuit Courts have similarly concluded that thirty-foot Latin crosses on public lands violated the Establishment Clause.<sup>281</sup>

Tenure matters for evaluating if a display is mixed speech because the longer the cross remains on public property, the less temporary it looks. Temporary religious displays on public property are less likely to suggest government endorsement or excessive entanglement with religion.<sup>282</sup> But the longer such displays are allowed to remain, the more permanent—and less temporary—they appear. Thus, the longer the tenure, the more these religious displays look like mixed speech, rather than purely private speech. Moreover, when memorials remain beyond a socially acceptable period of mourning, it becomes more likely that this use of the property may be contested.

Another factor that may be relevant in assessing whether or not the government has tacitly adopted a religious message is if the roadside cross is a contested use of s/p[l]ace. The use could be contested because it inflicts

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<sup>277</sup> *Lynch v. Donnelly*, 465 U.S. 688 (1984) (O’Connor, J., concurring).

<sup>278</sup> *Cf. Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment) (stating “no exact formula can dictate a resolution to such fact-intensive cases”).

<sup>279</sup> *See Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1164 (10th Cir. 2010), *amended and reh’g denied*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1107 (10th Cir. 2010), *cert. denied*, *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011); *cf. Trunk v. San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011) (concluding a twenty-nine-foot Latin cross dedicated as a war memorial sitting atop Mount Soledad in San Diego, California, “presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause”); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1100-01 (11th Cir. 1983) (concluding an illuminated Latin cross on an eighty-five-foot structure in a state park, which was “visible for several miles from the major highways,” violates the Establishment Clause).

<sup>280</sup> *Duncan*, 616 F.3d at 1162.

<sup>281</sup> *Trunk*, 629 F.3d at 1125 (a twenty-nine-foot Latin cross dedicated as a war memorial); *Rabun County Chamber of Commerce, Inc.*, 698 F.2d at 1101 n.1 (noting the dimensions of the cross were approximately twenty-six-feet by thirty-five-feet).

<sup>282</sup> *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

unwanted vicarious trauma on community members, is a safety hazard, or some in the community object to a sectarian symbol on a public space. The uncontested tenure of the Decalogue in *Van Orden* suggested to Justice Breyer that the “nonreligious aspects” of the display’s message predominated.<sup>283</sup> If the use of public space is highly contested and the government sides in favor of retaining the religious symbol, then it is more likely that the government is tacitly endorsing the message. Turning a blind eye to unauthorized, yet uncontested, use of public space is less likely to result in an implied adoption. But supporting a religious message in the face of community objection is more likely to result in mixed speech on behalf of both the private speaker and the government.

Yet removing these religious symbols could, as Professor Angela Carmella observed, “lead to the kinds of social conflict the Establishment Clause was intended to prevent; and that removal itself has a semiotic function, conveying its own negative message of rejection, depending upon the history and circumstances of the symbol.”<sup>284</sup> Government officials risk a double bind evocative of *Catch-22*.<sup>285</sup> If the crosses are allowed to stay for years, they look more permanent than temporary, and this looks more like government approval of a religious message. But if the crosses are removed, that removal has its own rhetorical function and risks conveying a message of disapproval of a religious message.

#### Conclusion

The roadside cross phenomenon is part of our long and complex story about the meaning of death and grieving.<sup>286</sup> Today, it appears that “[d]eath has moved out of the cemetery.”<sup>287</sup> Before a roadside memorial is emplaced, the location is merely public roadway space. But with the roadside cross, a rhetorical and symbolic place is formed. Memorializing the space transforms the place— “[n]o longer is the space merely a material place, it has social significance.”<sup>288</sup> We can visit the place and connect with the meaning of the place. As Professor Elizabethada Wright emphasized, “the place tells us something was there. It demands we begin to fill in the blanks. It tells us something was lost, thus

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<sup>283</sup> *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment); *id.* at 702-03 (“As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged . . . [and t]hose 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.”).

<sup>284</sup> Angela C. Carmella, *Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations*, 38 FLA. ST. U.L. REV. 481, 528 (2011) (citing *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring); *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Alito, J., concurring)).

<sup>285</sup> See JOSEPH HELLER, *CATCH-22* (1961).

<sup>286</sup> JOHN BELSHAW & DIANE PURVEY, *PRIVATE GRIEF, PUBLIC MOURNING: THE RISE OF THE ROADSIDE SHRINE IN BRITISH COLUMBIA* 15 (2009).

<sup>287</sup> Suter, *supra* note 155, at 51.

<sup>288</sup> Wright, *supra* note 76, at 70.

implying something, though it is missing, is desired.”<sup>289</sup> Roadside crosses are heterotopic deathscapes that serve to make the absent present. Roadside crosses serve to maintain a connection with the deceased, while helping afford healing and closure for the bereaved.

Such use of public space to commemorate private loss creates a visual argument. The traditional places afforded such use, like cemeteries, appear inadequate for some bereaved. Thus, collectively, private commemoration on public spaces is a visual critique of modernity’s culture, death practices, and religion. And selection of the Latin cross to commemorate the absent creates another rhetorical effect. Use of the Latin cross as a matter of cultural integration does not resolve whether the reasonable observer sees a sectarian or secular symbol. The Establishment Clause concerns are heightened when there is a risk that religious outsiders may not perceive a neutral message from the symbol. Religious insiders may be blind to their privileged position as well as the Latin crosses’ chilling effect on religious outsiders.

The aim of this Article is to provide background and context to help inform the reasonable observer. Whether the government has tacitly adopted a private religious message may turn on several factors, which include the size and location of the cross, its tenure, and whether it is a contested use of s/p[1]ace. But in light of the “highly fact-specific nature” of a “proper” endorsement inquiry, we are unlikely to resolve this question for the entire phenomenon and all roadside crosses.<sup>290</sup> The open question remains whether a message of approval and endorsement extends to crosses that have been allowed to remain—and proliferate—along the public roadways. What is the reasonable observer to conclude?

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<sup>289</sup> *Id.* at 71.

<sup>290</sup> *Salazar v. Buono*, 559 U.S. 700, 722 (2010).