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REQUIESCAT IN PACE: THE CEMETERY DEDICATION AND ITS IMPLICATIONS FOR LAND USE IN LOUISIANA AND BEYOND

RYAN M. SEIDEMANN*

INTRODUCTION

Louisiana, especially New Orleans, is storied for its cemeteries.¹ These sites have been featured in modern popular culture from *Easy Rider* to Disney's *The Princess and the Frog*.² While there is little doubt that these spaces of death contribute to the allure and the tourist draw of the area,³ they are nonetheless constantly threatened by development.⁴

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¹ See, e.g., ERIC J. BROCK, NEW ORLEANS CEMETERIES 7 (1999); see generally JAN ARRIGO & LAURA A. MCELROY, CEMETERIES OF NEW ORLEANS: A JOURNEY THROUGH THE CITIES OF THE DEAD (2005).

² Kevin Dowler, *X Marks the Spot: New Orleans Under Erasure*, in SPECTACULAR DEATH: INTERDISCIPLINARY PERSPECTIVES ON MORTALITY AND (UN)REPRESENTABILITY 118 (Tristianne Connolly ed., 2011); *New Orleans Lets You See NOLA Like Princess Tiana*, TRAVEL PULSE, <https://www.travelpulse.com/news/destinations/new-orleans-tourism-lets-you-see-nola-like-princess-tiana.html> [<https://perma.cc/N96Z-R3AS>] (last visited Mar. 19, 2018).

³ GARY KRIST, EMPIRE OF SIN: A STORY OF SEX, JAZZ, MURDER, AND THE BATTLE FOR MODERN NEW ORLEANS 324–25 (2015) (noting that New Orleans, for at least the past fifty years, embraced the darker aspects of its history as tourist draws. There are also downsides to this type of tourism in New Orleans, especially at the intersections of dark tourism and disasters); Stephen Svenson & Cory Ruf, *Life and Death in New Orleans: Disaster Tours Imagined*, in SPECTACULAR DEATH: INTERDISCIPLINARY PERSPECTIVES ON MORTALITY AND (UN)REPRESENTABILITY, 127, 134 (Tristianne Connolly ed., 2011); see also ADAM KARLIN & AMY C. BALFOUR, LONELY PLANET NEW ORLEANS 115, 117, 144, 148 (2012) (describing New Orleans as “something of a city of cemeteries” and calling Lafayette Cemetery No. 1 among the “Top Sights” of the Garden District and St. Louis Cemetery No. 1 a “Top Sights” of the Tremé); MICHELIN, NEW ORLEANS MUST SEES 62 (Cynthia

Threats are not unusual for historic resources and various state and federal laws enacted since the mid-1960s tried to minimize damage to such sites.⁵ However, cemeteries occupy a liminal legal space when it comes to status and protection between continuously used sacred spaces and historic resources.⁶ There is little direct, codified guidance regarding both how to interact with these spaces when they are encountered during development, and what to do in terms of protecting them from development or other threats (e.g., desecration).⁷ One exception to this lack of guidance is with respect to Native American cemeteries, about which exists a massive compilation of academic, legal literature arose, legislation, and regulations.⁸ Contrarily, there is a dearth of such critical analysis related to the protections available to virtually all non-Native American cemeteries.⁹

In order to understand the complex interactions of the spaces of the dead with those of the living, this review is an investigation of both the history of the cemetery dedication laws of Louisiana and the application of those laws in its jurisprudence. This area of inquiry is particularly

Clayton Ochterbeck ed., 2004) (classifying the New Orleans cemeteries as a “Must See”); NATHALIE JORDI, ALEXIS KORMAN, SUSAN GRANGER, & CAMERON TODD, *FODOR’S TRAVEL NEW ORLEANS 77* (Stephen Brewer ed., 2015) (classifying St. Louis Cemetery Nos. 1, 3, and Lafayette Cemetery No. 1 as “Top Attractions”).

⁴ See, e.g., State of Louisiana Site Record Update Form, Site No. 16OR108 (noting impacts to this site from adjacent transportation and recent streetcar line maintenance); State of Louisiana Site Record Update Form, Site No. 16OR92 (noting recent impacts to a cemetery site from construction and development at the site) (*on file with author*).

⁵ See, e.g., The National Historic Preservation Act of 1966, 54 U.S.C. § 300101 *et seq.*; the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*

⁶ Ryan M. Seidemann & Rachel L. Moss, *Places Worth Saving: A Legal Guide to the Protection of Historic Cemeteries in Louisiana and Recommendations for Additional Protection*, 55 LOY. L. REV. 449, 512 (2009).

⁷ In Louisiana, the law controlling such interactions is codified more than in most states, with the Louisiana Unmarked Human Burial Sites Preservation Act and the Louisiana Historic Cemetery Preservation Act. LA. STAT. ANN. §§ 8:671, 25:931 (2017) (illustrating how these legal principles interact with on-ground realities is poorly understood due to a lack of jurisprudential (and even practical) precedence).

⁸ See, e.g., James Riding In et al., *Protecting Native American Human Remains, Burial Grounds, and Sacred Places: Panel Discussion*, 19 WICAZO SA REV. 169, 170 (2004); see generally Dorothy Lippert, *Repatriation Reader: Who Owns American Indian Remains*, 25 MUSEUM ANTHROPOLOGY 80 (2002); Kathleen S. Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA*, 27 CAN. J. OF ARCHAEOLOGY 131, 131 (2002). It is also important to note that considerable litigation occurred related to these laws, further elucidating their operational practicalities. See, e.g., *Bonnichsen v. United States*, 357 F.3d 962, 966 (9th Cir. 2004).

⁹ See generally Ryan M. Seidemann, *NAGPRA at 20: What Have the States Done to Expand Human Remains Protections?*, 33 MUSEUM ANTHROPOLOGY 199, 203 (2010) [hereinafter Seidemann, *NAGPRA at 20*].

underreported in the academic literature related to cemeteries worldwide,¹⁰ despite recent experiences in Louisiana suggesting that the ancient legal concept of an inviolate cemetery may be the strongest protection existing anywhere in the law for historic spaces of any kind.¹¹ This review also briefly examines the paucity of discussions of the cemetery dedication in the existing land use, planning, historic preservation, archaeological, and legal literature to create a uniform understanding of that tool and its implications for planning and preservation in Louisiana.

The ancient concept of the cemetery dedication, at least in Louisiana, is emerging as a stronger site protection tool than the more recent historic preservation legislation. This is surprising as the latter laws intended specifically to stem the impacts of development and looting of cemeteries,¹² while the former laws did not.¹³ The significance of the emergence of the cemetery dedication as a factor in planning and as an historic preservation tool in Louisiana likely had implications across the United States, as the cemetery dedication is virtually ubiquitous in all fifty states.¹⁴ Ultimately, this means that little-known and underused tools for the protection of these sacred spaces lurk in most jurisdictions—this research aims to investigate the history, existence, and usage of such tools in Louisiana.

I. ABUSES OF CEMETERIES IN LOUISIANA AND ELSEWHERE

The land used for the interment of the human dead is often an afterthought in planning and development circles unless and until those

¹⁰ N. Işık Demirakin, *Expropriation as a Modernizing Tool in the Nineteenth-Century Ottoman Empire: The Case of Cemeteries in Beyoğlu*, 18 INT'L J. OF TURK. STUD. 1, 2 (2012) (focusing on the use of expropriation in Turkey to change cemetery use, but disappointingly not delving into what became of the human remains that may have needed to be moved as a result of the expropriation).

¹¹ *Id.* (derived from the realities of applying the latter enacted cemetery protection laws discussed herein to sites after the discovery of forgotten cemeteries during Hurricane Katrina rebuilding efforts. As discovered, all such legal concepts have workarounds that undermine strong protections for cemeteries, such as excavation only of human remains that might be disturbed by new construction rather than a requirement to protect all remains within the footprint of a project, regardless of direct impact.); Op. La. Att'y Gen. No. 10-0234 (Dec. 4, 2010); Op. La. Att'y Gen. No. 10-0258 (Dec. 10, 2010).

¹² LA. STAT. ANN. §§ 8:672, 25:932 (2017).

¹³ This reality is evident from the lack of the legislature noting as much in LA. STAT. ANN. §§ 8:304–307 (2017); compare with LA. STAT. ANN. §§ 8:672, 25:932 (West 2017).

¹⁴ See, e.g., CAL. HEALTH & SAFETY CODE § 8553; 8 TEX. HEALTH & SAFETY CODE ANN. § 711.035 (Deering 2017).

dead interfere with actual real estate development.¹⁵ Indeed, cemeteries occupy a binary position from a planning and public health perspective. On one hand, cemeteries are known as sacred and inviolate spaces; on the other they are nuisances and hazards that need to be marginalized and moved.¹⁶ In this regard, the literature is replete with discussions of the historical growth of urban areas, the drive to locate cemeteries at the margins of those areas,¹⁷ as well as the perceived public health threats of cemeteries when the urban growth reaches these “insidious” locales.¹⁸ Not only are the needs of a community for future burial spaces often not considered at the planning stage,¹⁹ but also cemeteries often create expensive and direct hindrances to development.²⁰ Admittedly, in many cases, when development encounters human remains or cemeteries, it is unexpected.²¹ Especially in rural (or formerly rural) areas, small family or church burial grounds contain often perishable or semipermanent markers.²² Due to

¹⁵ G. Bennett & P.J. Davies, *Urban cemetery planning and the conflicting role of local and regional interests*, 42 LAND USE POL'Y 450, 450–55 (2015); Christopher Coutts et al., *Projecting landscapes of death*, 102 LANDSCAPE AND URB. PLAN. 259, 260 (2011); Christien Klaufus, “*The dead are killing the living*”: *Spatial justice, funerary services, and cemetery land use in urban Colombia*, 54 HABITAT INT'L 77, 78 (2016). At the time of this writing, at least in Louisiana, the term “cemetery” is defined by law as “a place used or intended to be used for the interment of the human dead. It includes a burial park, for earth interments; or a mausoleum, for vault or crypt interments; or a columbarium, or scattering garden, for cinerary interments; or a combination of one or more of these” LA. STAT. ANN. § 8:1(7). Thus, the term, as used in this Article, does not refer to pet cemeteries, as the laws protecting the interment of humans have not (yet) been extended to the interments of animals (though this may be about to change, as pet burial legislation was recently introduced in Louisiana. S. B. 166, 2016 Reg. Sess. (La. 2016)).

¹⁶ Bennett & Davies, *supra* note 15, at 450–51.

¹⁷ See, e.g., PETER B. DEDEK, *THE CEMETERIES OF NEW ORLEANS: A CULTURAL HISTORY* 9 (2017); see also DELL UPTON, *ANOTHER CITY: URBAN LIFE AND URBAN SPACES IN THE NEW AMERICAN REPUBLIC* 210 (2008).

¹⁸ See, e.g., Bennett & Davies, *supra* note 15, at 451; Mark Jenner, *Death, Decomposition and Dechristianisation? Public Health and Church Burial in Eighteenth-Century England*, 120 ENG. HIST. REV. 615, 616 (2005).

¹⁹ Bennett & Davies, *supra* note 15, at 450.

²⁰ Seidemann & Moss, *supra* note 6, at 449, 455.

²¹ See, e.g., GLEN H. DORAN, *foreword to WINDOVER: MULTIDISCIPLINARY INVESTIGATIONS OF AN EARLY ARCHAIC FLORIDA CEMETERY* (2002) (recounting the discovery of the Windover site mortuary pond in Florida in the 1980s during construction for a proposed neighborhood near Cape Canaveral).

²² See, e.g., IAN W. BROWN, *MARKING GRAVES IN TUSCALOOSA COUNTY, ALABAMA: MUSINGS OF A TEACHER* 17, 18, 78 (2016); Keith M. Yanner & Steven J. Ybarrola, “*He didn't have no cross*”: *Tombs and Graves as Racial Boundary Tactics on a Louisiana Barrier Island*, 30(2) ORAL HIST. REV. 18, 19 (2003); Ryan M. Seidemann & Ericka L. Seidemann, *Where Art,*

poor documentation, such sites are often encountered only by accident after a project begins.²³ However, that is not always the case. There are well-documented examples of developers, or others aware of the presence or probable presence of cemeteries in the path of a planned project, simply choosing willful ignorance despite risk of damage to the cemetery.²⁴

Perhaps the most famous impact of development on Louisiana's cemeteries is the case of the Protestant Girod Street Cemetery. By the late nineteenth century, the cemetery found itself largely full and defunct as an operating burial place.²⁵ A combination of its prime location and unkempt nature led to its 1950s development as part of downtown New Orleans, currently located roughly in the area occupied today by the Mercedes-Benz Superdome and its parking garages.²⁶

Although New Orleans boasts some of the most well-known cemetery reuses (i.e., spaces that were once cemeteries and were later either lawfully²⁷ or unlawfully²⁸ put to non-cemetery uses), it is not the only city with such problems. Indeed, New York recently encountered problems with conflicting land uses when, during the construction of a General Services Administration ("GSA") building in Manhattan in 1991, workers unearthed what has come to be known as the African Burial Ground—the burial location of many first-generation slaves in North America.²⁹ A similar site

Junk, and Death Blur: Holt Cemetery, New Orleans, AM. CEMETERY 18 (Apr. 2005) (discussing the perishable nature of grave markers even in the urban New Orleans Holt Cemetery).

²³ BROWN, *supra* note 22.

²⁴ Examples of both good and bad actors encountering cemeteries abound. The Associated Press, *Damage to historic black cemetery spurs complaints, probe*, THE ST. JOURNAL-REGISTER (Jan. 7, 2017), <http://www.sj-r.com/news/20170107/damage-to-historic-black-cemetery-spurs-complaints-probe> [<https://perma.cc/28PT-LEMU>] (recounting the story of a logging company allegedly driving over a historic cemetery in Illinois); *but see* Aprile Rickert, *Excavations ongoing near Clarksville cemetery: Investigation necessary for road project*, NEWS & TRIB. (June 20, 2017), http://www.newsandtribune.com/news/excavations-ongoing-near-clarksvillecemetery/article_0454e358-560e-11e7-89db-0352b5e7e823.html [<https://perma.cc/6R8J-NMM3>] (discussing developers who paid for the proper archaeological excavations to be done before undertaking a construction project nearby).

²⁵ DEDEK, *supra* note 17, at 165.

²⁶ *Id.*

²⁷ See Louisiana Site Record Form, Girod Street Cemetery; *see also* Op. La. Att'y Gen. No. 10-0234 (Dec. 4, 2010) (stating the burials at the Gates of Mercy Cemetery were moved due to a 1957 Louisiana Supreme Court order).

²⁸ See State of Louisiana Site Record Update Form, Charity Hospital Cemetery No. 2, Site No. 16OR108; State of Louisiana Site Record Update Form, St. Peter Street Cemetery, Site No. 16OR92 (noting that, although the modern uses of these sites have complied with the law to the extent practicable, prior uses violated the dedication laws).

²⁹ See generally ANDREA E. FROHNE, THE AFRICAN BURIAL GROUND IN NEW YORK CITY: MEMORY, SPIRITUALITY, AND SPACE (2015).

has been discovered in New Orleans beneath structures along the south side of Rampart Street.³⁰ Pursuant to legal analyses undertaken related to the reuse of cemetery spaces following Hurricane Katrina,³¹ the cemetery on Rampart Street—known as St. Peter's Street Cemetery—has been slowly mitigated as new projects threaten the site's integrity as a cemetery.³² The GSA project resulted in protests over perceived racial biases in the treatment of the dead and considerable additional project expenses for the United States government.³³ Although such high profile cemetery problems have not yet been experienced in Louisiana, the numerous cemetery sites improperly put to alternative uses since statehood in 1812 certainly raise the specter of such problems in the future.³⁴ The African Burial Ground project, though difficult, was not without its benefits, including considerable knowledge acquired by the descendant community and a raised awareness of the sensitivities involved in such projects.³⁵

More commonly, cemeteries are not completely erased from existence by development. An example of such a space is Historic Highland Cemetery in Baton Rouge. Recent archaeological excavations and historical analyses have identified that Highland Cemetery, which is Baton Rouge's oldest existing cemetery, has contracted in size from two acres to one-half acre since its founding in 1813.³⁶ In this situation, a neighborhood simply grew up around the cemetery and slowly encroached onto the graves.³⁷

II. THE CEMETERY DEDICATION AND ITS RELATIONSHIP TO OTHER LOUISIANA SITE PROTECTION LAWS

In terms of strict legal classifications of cemetery land in general, under the laws of Louisiana, the purposeful interment of human remains

³⁰ See generally D. RYAN GRAY, REDISCOVERING THE 'ANTIGUO CEMENTERIO': ARCHAEOLOGICAL EXCAVATIONS AND RECOVERY OF HUMAN REMAINS FROM THE ST. PETER STREET CEMETERY (16OR92), ORLEANS PARISH, LOUISIANA (2016).

³¹ Op. La. Att'y Gen. Nos. 10-0018 (Mar. 18, 2010), 10-0234 (Dec. 3, 2010), 10-0258 (Dec. 10, 2010), and 10-0259 (Dec. 17, 2010).

³² GRAY, *supra* note 30, at 2–3.

³³ FROHNE, *supra* note 29, at 174–76.

³⁴ *E.g.*, GRAY, *supra* note 30.

³⁵ See generally FROHNE, *supra* note 29.

³⁶ Evelyn M. Thom, Highland Cemetery Preserved! 9 (compiled in 1974 and updated in 2005) (unpublished manuscript); see also Ryan M. Seidemann & Kenneth P. Kleinpeter, conference presentation at the 79th Soc'y. for Am. Archaeology Meeting: Restorative Excavations and Ground Truthing: Remote Sensing on the Cheap in Historic Highland Cemetery (16EBR190) (2014).

³⁷ Thom, *supra* note 36, at 11–13.

in the ground (or entombment on the ground, as the case may be) creates a legal cloud on a property's title.³⁸ This cloud, codified at Louisiana Revised Statutes §§ 8:304–307, is known as the “cemetery dedication.” The cemetery dedication is a common legal concept across the United States³⁹ and basically stands for the premise that, once human remains have been interred in a tract of land, that land is, forever, classified as a cemetery and cannot be put to alternative uses.⁴⁰

In Louisiana, there are a suite of additional laws aimed at protecting and preserving cemeteries and these laws exist across the legal spectrum from the federal level to the local level.⁴¹ A review of these laws is important to ensure an understanding of the accidental importance of the cemetery dedication. The seminal law for this purpose is the Native American Graves Protection and Repatriation Act (“NAGPRA”).⁴² As scholars have previously noted:

The purpose of this legislation was to remedy certain perceived injustices against Native Americans by returning to appropriate parties the remains of recently deceased Native Americans (i.e., those dead that were culturally affiliated with modern, existing tribes) whose remains were housed in federally funded museums and institutions. Further, NAGPRA applies certain protections to Native American burial sites inadvertently discovered on federal or tribal land.⁴³

In brief, NAGPRA is human rights legislation focusing specifically on human remains and burial sites.⁴⁴ It requires those seeking to impact Native American burial sites to either avoid such sites or to proceed with

³⁸ Ryan M. Seidemann, *How Do We Deal With All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 U. BALT. J. LAND & DEVELOP. 1, 1, 4, 17 (2013) [hereinafter Seidemann, *How Do We Deal With All the Bodies?*].

³⁹ *Id.* at 17.

⁴⁰ *Id.*

⁴¹ See, e.g., NAGPRA, 25 U.S.C. § 3001 *et seq.* (providing an example of federal protections); the Louisiana Unmarked Human Burial Sites Preservation Act, LA. STAT. ANN. § 8:671 *et seq.* (providing an example of state protections); NEW ORLEANS, LA., CODE §§ 38-11, 38-12 (2018) (providing an example of local protections).

⁴² 25 U.S.C. § 3001 *et seq.*

⁴³ Seidemann, *NAGPRA at 20*, *supra* note 9, at 199 (internal citations omitted).

⁴⁴ Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA L. REV. 149, 151–54 (2003).

such impacts only through a permitting process that includes considerable consultation with affected descendant communities.⁴⁵ In other words, if property contains human remains suspected to be those of Native Americans and is encountered during a project on federal or tribal land, or on a project that receives federal funding, any impacts to such property are subject to a heightened level of scrutiny and regulation, including input from empowered descendant groups, much more so than is the case with most other types of property or non-Native American cemetery sites.

With a few exceptions such as in Missouri and South Dakota,⁴⁶ legislation analogous to NAGPRA at the state level did not exist prior to NAGPRA's enactment in 1990. However, with the enactment of NAGPRA, many states, including Louisiana soon followed the federal model to protect cemetery sites on the property not covered by NAGPRA (i.e., state, municipal, and private property) and to protect the human remains of non-Native Americans.⁴⁷

In 1991, the Louisiana Legislature passed the Louisiana Unmarked Human Burial Sites Preservation Act ("the Unmarked Burials Act"),⁴⁸ a law that provided for NAGPRA-like restrictions on the disturbance of burial sites and the illicit trade in human remains. This law, which explicitly applies to human burial sites "without reference to ethnic origins, cultural backgrounds, or religious affiliations,"⁴⁹ is based upon the Legislature's assessment that "existing state laws do not provide for the adequate protection of unmarked burial sites"⁵⁰ from the threats of "economic development" and "the mining of prehistoric and historic Indian, pioneer, and Civil War and other soldiers' burial sites."⁵¹ As described by scholars, this law:

[G]ives prosecutors and law enforcement officials the power to enforce these protections, which had been absent from the earlier law. These powers include the authority to institute civil or criminal proceedings if provisions are violated; the authority to seek injunctive relief to stop

⁴⁵ Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. COLO. L. REV. 593, 620 (2012).

⁴⁶ H. Marcus Price, *Bones of Contention: Reburial of Human Remains under RS Mo. 194.400-410*, 5 MO. ARCHAEOLOGICAL SOC'Y Q. 4, 11, 18 (1988); Larry J. Zimmerman & John B. Gregg, *History of the Reburial Issue in South Dakota*, 13 S.D. ARCHAEOLOGY 89 (1989).

⁴⁷ Seidemann, *NAGPRA at 20*, *supra* note 9, at 203-04.

⁴⁸ LA. CODE ANN. § 8:671 *et seq.* (West 2018).

⁴⁹ LA. CODE ANN. § 8:672 (West 2018).

⁵⁰ *Id.*

⁵¹ *Id.*

cemetery destruction that seems imminent; the authority to seek recompense for site restoration; and the authority to permit any disturbance that may fall within the purview of the law (La. R.S. 8:676). In addition to the actual site protections noted above, the Unmarked Burials Act also makes it unlawful to “buy, sell, barter, exchange, give, receive, possess, display, discard, or destroy human skeletal remains from an unmarked burial site or burial artifacts” (La. R.S. 8:678(2)).⁵²

Although the Unmarked Burials Act was, compared to NAGPRA, a sweeping change in the control of certain activities in and on cemetery sites in Louisiana,⁵³ it was not without its own shortcomings. In particular, the presence of the somewhat vague key term “unmarked burial” led both to the need for interpretation⁵⁴ and, later, to additional legislation (discussed below) in order to ensure the completeness of the Unmarked Burials Act’s site protections to virtually all cemeteries in Louisiana.⁵⁵

Enacted in 2010, the additional legislation, known as the Louisiana Historic Cemetery Preservation Act (“the Historic Cemetery Act”)⁵⁶ “is more detailed and more specific to abandoned cemeteries and isolated graves than” is the Unmarked Burials Act.⁵⁷ Characterized as a “largely superfluous” law, the Historic Cemetery Act “is not an actual change in the law, but . . . [rather] provides substantial clarity” regarding the protections afforded cemetery sites in Louisiana over previous laws.⁵⁸ Like the Unmarked Burials Act, the Historic Cemetery Act sets forth a series of permitted and prohibited acts in and on cemetery spaces in Louisiana’s

⁵² Seidemann, *NAGPRA at 20*, *supra* note 9, at 201–02.

⁵³ Seidemann & Moss, *supra* note 6, at 31.

⁵⁴ Op. La. Att’y. Gen. No. 07-0183 (Sept. 17, 2007).

⁵⁵ Neither the Unmarked Burials Act nor its progeny apply to licensed, operating cemeteries under the jurisdiction of the Louisiana Cemetery Board. This means that the archaeological methodologies required by these laws for disturbances to unmarked, historical, and abandoned cemeteries are not mandatory in cemeteries subject to the Louisiana Cemetery Board’s jurisdiction, which means that the only existing protections for such spaces are some vague portions of LA. STAT. ANN. §§ 8:308, 8:903 and the cemetery dedication laws. Seidemann & Moss, *supra* note 6, at 16, 18. Thus, the application of those laws is not quite complete in Louisiana.

⁵⁶ LA. STAT. ANN. §§ 25:931 *et seq.* (2018).

⁵⁷ Ryan M. Seidemann, *Do Not Disturb: A Practical Guide for What Not to Do Around Cemeteries and Human Remains for the Louisiana Energy and Land Use Practitioner*, 2 LSU J. ENERGY L. AND RES. 238, 252 (2014) [hereinafter Seidemann, *Do Not Disturb*].

⁵⁸ *Id.* at 252–53.

historic and abandoned cemeteries.⁵⁹ Both of these laws contain provisions that restrict the disturbance of most cemeteries in Louisiana⁶⁰ and prohibit the sale of human remains and artifacts originating from burial sites in Louisiana.⁶¹ Further, both laws funnel any necessary disturbances to cemeteries into an archaeologically driven permitting process that creates a balance between development and preservation that favors the protection of burial sites and the professional and painstaking analysis of such sites should their disturbance be necessary.⁶²

One additional cemetery protection law worthy of mention is the Criminal Code provision that prohibits grave desecration: La. R.S. 14:101. This law states:

- A. Desecration of graves is either of the following:
 - (1) Unauthorized opening of any place of interment, or building wherein the dead body of a human being is located, with the intent to remove or to mutilate the body or any part thereof, or any article interred or intended to be interred with the body.
 - (2) Intentional or criminally negligent damaging in any manner of any grave, tomb, or mausoleum erected for the dead.

- B. Whoever commits the crime of desecration of graves shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.⁶³

⁵⁹ LA. STAT. ANN. §§ 25:935, 25:937 (2018).

⁶⁰ The Unmarked Burials Act exempts from its jurisdiction any “. . . cemetery operated under the authority and regulation of the Louisiana Cemetery Board, or any recognized and maintained municipal, fraternal, religious, or family cemetery.” LA. STAT. ANN. § 8:674. The Historic Cemetery Act exempts from its jurisdiction any “. . . cemetery operated under the authority and regulation of the board[;]” “[a]n unmarked burial site that is covered under the. . .” Unmarked Burials Act; and “[g]rave spaces within abandoned cemeteries that are less than fifty years old.” LA. STAT. ANN. § 25:943.

⁶¹ Such sales are a problem both in Louisiana and nationwide. Ryan M. Seidemann et al., *The Identification of a Human Skull Recovered from an eBay Sale*, 54 J. OF FORENSIC SCI. 1247, 1247–48 (2009); Christine L. Halling & Ryan M. Seidemann, *They Sell Skulls Online?! A Review of Internet Sales of Human Skulls on eBay and the Laws in Place to Restrict Sales*, 61 J. OF FORENSIC SCI. 1322, 1322 (2016).

⁶² Seidemann, *Do Not Disturb*, *supra* note 57, at 243, 245.

⁶³ LA. STAT. ANN. § 14:101 (2011).

Although this law has existed for some time, it appears to have been seldom used. One probable reason for the lack of reported cases under this law is that it applies to individuals and is penal in nature rather than permissive. In other words, though the law contains restrictions, it may only be applied when a violation has occurred. Contrarily, the preservation laws noted above apply to property, and prospectively shape and restrict uses of that property rather than merely punishing wrongdoing. Another reason that few desecration cases appear in the reported jurisprudence (indeed, there are no true reported criminal desecration cases in Louisiana), is that it is a misdemeanor and a violation of this law simply does not warrant prosecutions when a district attorney's docket is clogged with murders, rapes, and other felonies.⁶⁴ Thus, it appears that, while this law is a cemetery protection law, its utility is questionable in most circumstances and it is only minimally relevant to matters relating to planning and development.

Unlike the preservation and criminal laws above, when the Louisiana Cemetery Act was enacted in 1974, the Legislature included provisions to ensure sanctity of cemeteries that appear to represent the strongest legal protections in existence in Louisiana for such spaces. These provisions, known collectively as the "cemetery dedication," have not materially changed since their original enactment, and are comprised of four statutes in Title 8 of the Louisiana Revised Statutes: Louisiana Revised Statutes §§ 8:304–307.⁶⁵ These statutes provide, in pertinent part, as follows:

⁶⁴ See, e.g., Jason Brandeis, *The Continuing Vitality of *Ravin v. State: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes**, 29 ALASKA L. REV. 175, 203 (noting that misdemeanor prosecution of marijuana possession is rare in Alaska); Kimberly Bolte, *Shot Through the Heart: The FDA Gives All Health Care Company Executives a Bad Name Under the Controversial Strict-Liability Misdemeanor Provision of the Federal Food, Drug, and Cosmetic Act*, 6 BROOK. J. CORP. FIN. & COM. L. 593, 594 n.6 (2012) (noting rarity of prosecuting misdemeanor violations of FDA criminal provisions); Susan D. Hoppock, *Current Development 2006–2007: Enforcing the Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 731 (2007) (noting that misdemeanor prosecutions are not worth the time of prosecutors). Indeed, a recent case of human remains pilfering from Holt Cemetery in New Orleans was pled as a theft rather than a desecration as the former is a felony. John Simerman, *Guilty Plea, Not Witchcraft, Springs 'Witch' From Jail Over Theft of New Orleans Cemetery Bones*, NEW ORLEANS ADVOC. (Sep. 9, 2016), http://www.theadvocate.com/new_orleans/news/courts/article_27a4fbe2-76bf-11e6-8a7a-735b0d1735ee.html [<https://perma.cc/M2LG-MP6D>].

⁶⁵ Although Louisiana Revised Statute § 8:307 is a part of the cemetery dedication, it merely contains procedural notice requirements for the removal of the dedication and is thus not reproduced here.

After property is dedicated to cemetery purposes pursuant to this Chapter, neither the dedication nor the title of a plot owner shall be affected by the dissolution of the cemetery authority, by nonuse on its part, by alienation of the property, or otherwise, except as provided in this Title⁶⁶

* * *

Dedication to cemetery purposes pursuant to this title is not invalid as violating any laws against perpetuities or the suspension of the power of alienation of title to or use of property but is expressly permitted and shall be deemed to be in respect for the dead, a provision for the interment of human remains, and a duty to and for the benefit of the general public.⁶⁷

* * *

Property dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes unless and until the dedication is removed from all or any part of it by judgment of the district court of the parish in which the property is situated in a proceeding brought by the cemetery authority for that purpose and upon notice of hearing to the board, and by publication as hereinafter provided, and proof satisfactory to the court: (1) That no interments were made in or that all interments have been removed from that portion of the property from which dedication is sought to be removed; and (2) That the portion of the property from which dedication is sought to be removed is not being used for interment of human remains.⁶⁸

Read together, these provisions stand for the proposition that, once human remains have been interred in a piece of property, that property is forever dedicated as a cemetery.⁶⁹ In addition, such property cannot be put to any use other than a “cemetery use” unless all human remains are

⁶⁶ LA. STAT. ANN. § 8:304(A) (2018).

⁶⁷ LA. STAT. ANN. § 8:305 (2018).

⁶⁸ LA. STAT. ANN. § 8:306(B) (2018).

⁶⁹ Seidemann, *Do Not Disturb*, *supra* note 57, at 247.

removed from the property and a court of competent jurisdiction issues an order removing the dedication.⁷⁰

These strict prohibitions are occasionally in conflict with modern archaeological preferences for preservation of cultural materials and human remains *in situ* when possible.⁷¹ In other words, using modern archaeological methods, it is often more advisable to remove only the portion of a site that is to be impacted by development, leaving the remainder of the archaeological deposits intact for either future excavation or for general preservation.⁷² This latter approach presents a much more attractive option for developers when cemetery impacts are unavoidable—remove only what will be impacted, not all human remains in the project area—as such, an approach is substantially less expensive to implement than a full removal of all burials. This approach, while economically and archaeologically advisable, is not legally authorized due to the strict mandates of La. R.S. 8:306(B). Quoted above, this legal provision clearly mandates that once property is dedicated for use as a cemetery, the legal cloud that hangs over that property exists until removed by a court judgment finding that “all interments have been removed” from the property.⁷³ Accordingly, there can be no alternative use of cemetery property until all of the remains have been removed. Whether scientifically or economically preferable, the absolute ban on alternative uses of cemetery property under the cemetery dedication is the mandatory legal manner in which cemeteries must be treated in Louisiana. Whether this mandate is applicable to all property in Louisiana in which human remains are interred depends on the history of the law itself.

III. A PROPOSED HISTORY OF THE CEMETERY DEDICATION

In general, the retroactive application of law is disfavored and often will not be allowed by the courts.⁷⁴ Such a reality is problematic when the bulk of the cemetery regulation laws in the United States were not enacted until after Jessica Mitford’s publication of her funeral industry exposé, *The American Way of Death*, in 1963.⁷⁵ Indeed, as discussed below,

⁷⁰ LA. STAT. ANN. § 8:306 (2018).

⁷¹ Seidemann, *Do Not Disturb*, *supra* note 57, at 249, 254–55.

⁷² *Id.*

⁷³ LA. STAT. ANN. § 8:306 (2018) (emphasis added).

⁷⁴ See, e.g., *M.J. Farms, Ltd. v. ExxonMobil Corp.*, 07-2371, p. 1 (La. 7/1/08), 998 So.2d 16; *Landgraf v. USI Film Products*, 511 U.S. 244, 262, 266 (1994).

⁷⁵ JESSICA MITFORD, *foreword to THE AMERICAN WAY OF DEATH* (1963); see DAVID CHARLES SLOANE, *THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY* 230 (1991) (commenting on the importance of Mitford’s book). This book was important because it,

though the concepts undergirding Louisiana's cemetery dedication laws had existed in the jurisprudence definitively since the 1940 Louisiana Supreme Court case of *Humphreys v. Bennett Oil Corp.*,⁷⁶ the actual cemetery dedication statutes were not legislatively enacted until 1974.⁷⁷ How, then, can landowners be forced to endure restrictions on their land or clouds on their title aimed at protecting cemeteries when either the cemetery long predates the protective laws, or the chain of title for the specific tract of land predates those same laws? In order for such protections to apply to property without running afoul of the prohibition against retroactivity of laws, or otherwise representing a taking of private property by the government,⁷⁸ the protections must predate the interest acquired by the current landowners (or their ancestors-in-title, depending upon their method of property acquisition). Because many of the cemeteries that now need protection predate the modern era, there is an argument to be made that the application of a 1974 law to a property condition (i.e., that the property contains burials) would be a prohibited retroactive application of the law.

From the review above, it is clear that none of the cemetery-specific protection laws—NAGPRA (1990), the Unmarked Burials Act (1991), the Historic Cemetery Act (2010), or even perhaps the criminal desecration laws (1950)—predated much property ownership in Louisiana.⁷⁹ Thus, the key to cemetery protections for those sites located on private property in Louisiana and elsewhere lies in the cemetery dedication—a concept that appears to be particularly ancient in nature. However, the research herein demonstrates that no defense of retroactive application is viable to challenge the cemetery dedication provisions, as such provisions represent the custom in Louisiana and other civil law jurisdictions for millennia.

like Rachel Carson's 1962 environmental exposé, *Silent Spring*, riled the public regarding perceived and actual shady actions by members of the death care industry to defraud and upsell the public in times of mourning. This public attention spurred legislators to act to attempt to regulate this industry. See RACHEL CARSON, *SILENT SPRING* (1962).

⁷⁶ *Humphreys v. Bennett Oil Corp.*, 197 So. 222, 229 (La. 1940).

⁷⁷ LA. STAT. ANN. §§ 8:60, 204, 300, 602, 650, 702, 801 (1974).

⁷⁸ It is noteworthy that in at least two jurisdictions—Rhode Island and Minnesota—courts have suggested that it is questionable whether regulation of burial sites on private property is, in fact, a taking under the United States and state constitutions. For Rhode Island, see Seidemann, *How Do We Deal With All the Bodies?*, *supra* note 38, at 18–19; see National Trust for Historic Preservation, *Minnesota Court Dismisses Inverse Condemnation Challenge to State Human Burial Remains Statute*, 9 PRES. L. REP. 1158, 1158, 1160 (1990).

⁷⁹ Native American Graves Protection Act, 25 U.S.C.S. § 3001 (1991); Louisiana Unmarked Human Burial Sites Preservation Act, LA. STAT. ANN. § 8:671 (1991); Louisiana Historic Cemetery Preservation Act, LA. STAT. ANN. §§ 25:931–43 (2010).

A. *The Shallow History of the Cemetery Dedication in Louisiana*

Although the actual cemetery dedication provisions were enacted in 1974, it is clear from predating jurisprudence that the courts in Louisiana accorded cemeteries some measure of protected status as special spaces.⁸⁰ In particular, there are at least five pre-1974 Louisiana cases that stand for the notion that cemeteries are inviolate pieces of property.

In the early case of *Choppin v. Dauphin*,⁸¹ the Louisiana Supreme Court wrestled with the question of whether the use of land for interment somehow disrupted long-accepted concepts of property ownership. Although the Court never specifically addressed what is known as the cemetery dedication, it did appear prescient of disputes later to come when it noted that:

[T]o disturb the mortal remains of those endeared to us in life sometimes becomes the sad duty of the living. But, except in cases of necessity, or for laudable purposes, the sanctity of the grave should be maintained, and the preventive aid of the courts may be invoked for that object.⁸²

In other words, the Court recognized that disturbance of cemeteries is disfavored, but that when such disturbances must occur, an uninterested arbiter (i.e., a court) has the authority to direct the disturbances.⁸³ This precise concept is embodied in the current statutory cemetery dedication when those seeking the removal of a dedication must apply to a court for final approval.⁸⁴

Ultimately, the *Choppin* Court did not specifically classify the type of restriction or right that a cemetery use places on property in Louisiana. The Court correctly noted that such use did not affect the underlying ownership of the property,⁸⁵ but that it also did not create a servitude in favor of the families of those interred on the property.⁸⁶ Nonetheless, the Court sidestepped an actual conclusion as to the nature of the legal classification of such property, and instead seemed to hold that the remains in

⁸⁰ LA. STAT. ANN. §§ 8:60, 204, 300, 602, 650, 702, 801 (1974).

⁸¹ *Choppin v. LaBranche*, 20 So. 681, 682 (La. 1896).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ LA. STAT. ANN. § 8:306 (2010).

⁸⁵ *Choppin*, 20 So. at 683.

⁸⁶ *Id.* at 683 (on r'hrng.).

the disputed tomb could not be disturbed based upon a contract between the tomb owner and its inhabitants (during life), and further based upon the general disfavor with the disturbance of the dead.⁸⁷ In this regard, the Court was loathe to create a species of property right without explicit authorization from the Civil Code.⁸⁸ As is set forth below, such a jurisprudential creation is not inconsistent with Louisiana's civil law system and, had the *Choppin* Court wished, it could have found ample historical support for the notion that interment creates a legal dedication that burdens the underlying (and overlying) property.

The case of *Humphreys v. Bennett Oil Corp.*⁸⁹ represents the worst-case scenario interaction between the special nature of cemeteries and the violation of their sanctity. In *Humphreys*, a mineral production company thought it advisable to sink two oil wells into a rural cemetery in Acadia Parish, Louisiana.⁹⁰ When descendants of those interred in the offended cemetery brought suit against the production company for, among other things, mental anguish, the Louisiana Supreme Court reacted harshly, with an uncharacteristically editorial decision. In this decision, the Court described the problem in the following manner:

It is admitted that this small Evangeline Cemetery, consisting of a one-acre plot of ground, was literally converted into an oil field by the drilling thereon of two producing wells. By such use, this consecrated ground, which was destined for the peaceful slumber of the dead, was transformed into an industrial site, to be exploited for material gain This use of the cemetery plot divested it of its sacred character, violated and profaned the sanctity of the graves. This was a desecration calculated to wound the feelings of the living who had relatives buried there.⁹¹

It is clear simply from the tone of the decision that the Court did not take kindly to non-cemetery uses of cemetery property. Although the Court's rhetoric in this case contains a bit of purple prose, it also belies a judicial reverence for the spaces of the dead. The Court also explicitly addressed the concept of the cemetery dedication when it stated the following:

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Humphreys*, 197 So. at 228.

⁹⁰ *Id.* at 229.

⁹¹ *Id.* at 222, 228.

Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its character in the minds and feelings of the community. “It assumes a sacred quality that overrides conveyances’ precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors.”⁹²

With the above statement, the Louisiana Supreme Court unequivocally recognized that the presence of a cemetery on a tract of land fundamentally changes the character of that land such that the land cannot be used for anything but the interment of the human dead unless and until the remains are removed from the ground.

An interesting caveat to the cemetery dedication as espoused by the *Humphreys* Court is the notion, taken from Jackson,⁹³ that the cemetery dedication can effectively disappear from a tract of land upon “complete disintegration” of the human remains therein such that “there remains nothing to appeal to the emotions of the survivors.”⁹⁴ Such an exception to the cemetery dedication is certainly inconsistent with the later-enacted dedication statute, which does not authorize the removal of the dedication protections either upon the disintegration of the human remains or upon the descendant community’s forgetfulness of the cemetery’s existence.⁹⁵ Though this is an interesting caveat that the Court took from Jackson, it does not appear to be supported elsewhere in the history of the cemetery dedication (certainly not in Louisiana), and it is definitely not the case today under the statutory cemetery dedication.⁹⁶

The proximate result for the litigants of the *Humphreys* case was less significant than for the protection of cemeteries in general. The Court awarded the anguished family only \$6,000.20 in damages (approximately \$106,545.90 in 2017).⁹⁷ Nonetheless, although the descendants of those buried in the disturbed cemetery in *Humphreys* did not obtain a

⁹² *Id.* at 222, 229 (quoting PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIALS AND BURIAL PLACES* 206 (1936)).

⁹³ JACKSON, *supra* note 92, at 206.

⁹⁴ *Humphreys*, 197 So. at 229 (quoting JACKSON, *supra* note 92, at 206).

⁹⁵ See generally LA. STAT. ANN. §§ 8:304–07 (2010).

⁹⁶ *Id.*

⁹⁷ *Humphreys*, 197 So. at 230.

windfall judgment, the case is an exemplar of cemetery protections available in Louisiana.

The Girod Street Cemetery was the focus of the case, *City of New Orleans v. Christ Church Corp.*⁹⁸ At issue in this case was whether the cemetery dedication is permanent or whether it can be removed.⁹⁹ In this case, a curator appointed by the court to represent the interests of the unknown descendants of those interred in the cemetery argued that, when the City of New Orleans sought to expropriate the property on which Girod Street Cemetery was located for the purposes of road expansions and other public works, it could not do so because the land was burdened with a cemetery dedication in perpetuity.¹⁰⁰ The Court in this case rejected that notion, again stating that a dedication could be removed, but a particular process must be followed by which to remove the dedication (i.e., removal and reinterment of remains and a court judgment approving of the removal).¹⁰¹ In a particularly poetic conclusion, the *Christ Church* Court held that, the cemetery dedication is not necessarily perpetual and that, if proper procedure is followed, such a restrictive property use can be removed.¹⁰² Thus, the Court concluded:

It was with a prophetic eye that the poet of the day saw the dawning of a great transition period, and so he exclaimed to the world to ring out the old and to ring in the new. The old has been rung out, and the new rung in by keeping in step with progress and development. We cannot allow any deterrent of expansion by a beating of the living with the bones of the dead.¹⁰³

In the matter of *Touro Synagogue v. Goodwill Industries of New Orleans Area, Inc.*,¹⁰⁴ the Louisiana Supreme Court was presented with a factual scenario that directly implicated the cemetery dedication some 17 years before its enactment by the Legislature. The Court recited the following summary of the facts in the *Touro* case:

⁹⁸ *New Orleans v. Christ Church Corp.*, 81 So.2d 855, 856 (La. 1955).

⁹⁹ *Id.* at 857.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 861.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Touro Synagogue v. Goodwill Indust. of New Orleans Area, Inc.*, 96 So.2d 29, 29 (La. 1957).

On April 9, 1956, Touro Synagogue agreed to sell, and Goodwill Industries agreed to buy, an abandoned cemetery at the corner of Jackson Avenue and South Saratoga Street in this city for \$50,000. In this agreement Touro Synagogue bound itself to remove at its own expense and in compliance with proper religious ceremony all remains and tombstones from the abandoned cemetery to a cemetery which it is presently using. Pursuant to this agreement Touro tendered title to Goodwill, but the latter refused to accept title on the ground that title was litigious and not merchantable because the property was used as a cemetery at one time and the remains of the dead had never been removed. This suit followed.¹⁰⁵

In the above recitation, it is clear that, by 1957, there was a recognized legal concept of property being dedicated to cemetery purposes, and that such a dedication placed a cloud on title to current or former cemetery property.

The “abandoned cemetery” at the heart of the *Touro* case was the Gates of Mercy Cemetery, established in 1828 and last used in 1872.¹⁰⁶ By the time of the *Touro* case in 1957, there had been no interments made in the Gates of Mercy Cemetery in 85 years.¹⁰⁷ Nonetheless, and not surprisingly, the prospective purchaser of the property, Goodwill Industries, was wary of acquiring a cemetery when the purchaser’s planned use of the property was to operate a facility other than one involved in deathcare on the site of the former cemetery.¹⁰⁸ As a result of this apprehension, the district court in the *Touro* case acknowledged that Touro and Goodwill had entered into a valid contract to sell the abandoned cemetery property, but that such a sale could only be properly consummated if the seller (Touro) funded the disinterment and reinterment (elsewhere) of the remains of those buried in the cemetery.¹⁰⁹

On appeal to the Louisiana Supreme Court, the Court was again presented with the question of whether a cemetery could ever be put to a non-cemetery use.¹¹⁰ The Court answered that question in the affirmative,

¹⁰⁵ *Id.* at 29, 31.

¹⁰⁶ *Id.* at 29.

¹⁰⁷ *Id.* at 30.

¹⁰⁸ *Id.* at 30–31.

¹⁰⁹ *Touro Synagogue*, 96 So.2d at 32.

¹¹⁰ *Id.* at 32–34.

noting that, consistent with earlier rulings, as long as the human remains had been properly removed from the cemetery property, a cemetery could be decommissioned and the land could be put to an alternative use.¹¹¹ Further, and more specifically to the facts of this case, the Court found that, because the cemetery had been abandoned (no longer a requirement for the removal of a dedication) and because the synagogue was willing to relocate the human remains interred in the cemetery, there was no prohibition on the sale of the property for non-cemetery uses.¹¹² Moreover, once the remains removal was accomplished, there was no longer a cemetery dedication burdening the property.¹¹³

Thus, while the *Humphreys* Court recognized the sacred and generally inviolate nature of cemetery property in 1940,¹¹⁴ the *Touro* Court, in 1957, reaffirmed that inviolate nature of cemetery property, but also acknowledged that cemetery dedications could be removed from property.¹¹⁵ The *Touro* Court noted that, as long as certain procedures were followed, such sacred spaces could be converted to another use.¹¹⁶ Specifically, these procedures were the respectful removal of the human remains interred in the cemetery and their reinterment elsewhere.¹¹⁷

Though not a Supreme Court case, the matter of *Locke v. Lester*,¹¹⁸ reiterates the concept of the cemetery dedication previously established by court decision. Further, *Locke* stands for the idea that all that is required to effectuate such a dedication is the commitment of human remains to a piece of ground.¹¹⁹ In this regard, the court in *Locke* stated:

¹¹¹ *Id.* at 33–34.

¹¹² *Id.* at 36, 39.

¹¹³ *Id.* at 37–39.

¹¹⁴ *Humphreys*, 197 So. at 229.

¹¹⁵ *Touro Synagogue*, 96 So.2d at 33–34.

¹¹⁶ *Id.* at 38–39.

¹¹⁷ Anecdotal evidence exists that, prior to the advent of modern archaeological methods in the dedication removal process in the 1990s–2000s, much of this “respectful” removal was accomplished with laborers digging up remains under the supervision of funeral directors. While such an approach may have been reasonably calculated to account for the proper moving of human remains in sturdy burial containers, experience has shown that it was not unusual for human remains to be missed and left behind during these relocation events when the burial containers had broken down and the remains had become mixed with the surrounding matrix. Such a scenario was likely the situation in the *Touro Synagogue* matter, as is evidenced by the post–Hurricane Katrina encounters with human remains at the site of the former Gates of Mercy Cemetery. *See* Op. La. Att’y Gen. No. 10-0234 (Dec. 3, 2010).

¹¹⁸ *Locke v. Lester*, 78 So.2d 14, 14–15 (La. Ct. App. 1955).

¹¹⁹ The potential unintended consequences of such a broad interpretation of the cemetery dedication was addressed by the Louisiana Attorney General in 2010. Op. La. Att’y. Gen.

[w]e are of the opinion the reservation of said tract of land for use by the public as a burial ground or cemetery and its continuous use by the general public since it was set apart as a burial ground, is legally sufficient to dedicate said property for public use.¹²⁰

B. The Deep History of the Cemetery Dedication

Although there is no legislative history accompanying the enactment of the Louisiana Cemetery Act in 1974¹²¹ (of which the cemetery dedication is a part), it can be reasonably presumed that the cases discussed above formed the basis for the modern concept of the cemetery dedication in Louisiana. Finding support for that supposition is essential to ensuring the legally binding nature of the concept of the cemetery dedication. Indeed, such support is necessary in light of the *Choppin* Court's reticence to "create law,"¹²² to modify the Louisiana Civil Code property concepts that remain in force today. To this end, as noted above, portions of the *Choppin*, *Humphreys*, *Christ Church*, and *Touro* cases are present in the modern version of the cemetery dedication law. In order to bridge the gap between these cases and land titles that may predate them (thus requiring a retroactive application of the dedication law), it is necessary to determine whether more ancient concepts of the cemetery dedication than 1896 (*Choppin*) exist. The reason for this need is that, among the sources of law in Louisiana are "legislation and custom."¹²³ Clearly, the *Choppin* Court did not find the cemetery dedication in any of the legislative sources of Louisiana law.¹²⁴ The customary sources of Louisiana law present a more difficult problem. According to the Civil Code, "[c]ustom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation."¹²⁵ Thus, custom as a source of law must represent a pattern of practice over a period of time and it cannot survive as a source of law if it conflicts with existing legislation.¹²⁶ Prior to the enactment of

No. 10-0258 (Dec. 10, 2010). Suffice it to say that the simple death of an individual on a spot certainly does not a cemetery make. *Id.*

¹²⁰ *Locke*, 78 So.2d at 14, 15.

¹²¹ LA. STAT. ANN. §§ 8:60, 204, 300, 602, 650, 702, 801 (1974).

¹²² *Choppin*, 20 So. at 683.

¹²³ LA. CONST. ANN. art. 1 (2018).

¹²⁴ *Choppin*, 20 So. at 683.

¹²⁵ LA. CONST. ANN. art. 3 (2018).

¹²⁶ *Doerr v. Mobil Oil Corp.*, 00-0947 (La. 12/19/00), 774 So.2d 119, 128.

the cemetery dedication, there was ample jurisprudence (discussed above) that supported the notion that restrictions existed on property used for the interment of human dead before 1974, thus meaning that the cemetery dedication represents a pattern or practice over a period of time. Indeed, among the sources of custom as law in Louisiana are prior versions of law on which Louisiana's law is based.¹²⁷ Louisiana's legal system, now a virtual hybrid of civil and common law principles, traces its history back through various civil codes dating from 1808 through the present, and before that, through French and Spanish civil codes, all of which trace their legal origins in one form or another to Rome.¹²⁸ Thus, legal concepts in Louisiana that are traceable to a Roman source of law carry considerable weight even if not incorporated into the positive legal codes of the State.¹²⁹

The *Institutes of Justinian* were written in the sixth century as part of the *Corpus Juris Civilis*—a compilation of Roman civil law created at the behest of Emperor Justinian I, with various drafts being completed circa A.D. 534.¹³⁰ The *Corpus Juris Civilis* is seen as a fundamental source of Roman law, being the formal successor to the prior codifications in the *Twelve Tables* (c. 450 B.C.) and the *Lex Aquilia* (c. 287 B.C.).¹³¹ The influence of this Roman law on Louisiana's Civil Code cannot be understated, leading commentators to observe that Louisiana law represents "[t]he living institutes of Justinian."¹³² Thus, the presence of positive statements related to the sanctity of cemeteries in the *Institutes of Justinian* is of no small moment in the history of the development of this legal concept in Louisiana. In the *Institutes of Justinian*, the following is stated as the sixth century Roman law of sacred spaces:

8. Those things are sacred which have been duly consecrated to God by His ministers, such as churches and votive offerings which have been properly dedicated to His service; and these we have by our constitution forbidden to be

¹²⁷ In this regard, it is noted that Roman law is not legislation in Louisiana and must, by process of elimination, be part of the customary sources of Louisiana law.

¹²⁸ See generally Symeon C. Symeonides, *The Romanist Tradition in Louisiana: Legislation, Jurisprudence, and Doctrine: A Symposium: An Introduction to "The Romanist Tradition in Louisiana": One Day in the Life of Louisiana Law*, 56 LA. L. REV. 249, 251 (1995).

¹²⁹ See, e.g., *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 138 (La. 1841) (in which the Court substantially rests its decision on an analysis of Roman law).

¹³⁰ Richard A. Pacia & Raymond A. Pacia, *Roman Contributions to American Civil Jurisprudence*, 49 R.I. B.J. 5, 9 (2001).

¹³¹ Peter Stein, *ROMAN LAW IN EUROPEAN HISTORY* 33 (1999).

¹³² Pacia & Pacia, *supra* note 130, at 39.

alienated or pledged, except to redeem captives from bondage. If any one attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred. The ground on which a sacred building is erected remains sacred even after the destruction of the building, as was declared also by Papinian.

9. Any one can devote a place to superstitious uses of his own free will, that is to say, by burying a dead body in his own land. It is not lawful, however, to bury in land which one owns jointly with some one else, and which has not hitherto been used for this purpose, without the other's consent, though one may lawfully bury in a common sepulchre even without such consent. Again, the owner may not devote a place to superstitious uses in which another has a usufruct, without the consent of the latter. It is lawful to bury in another man's ground, if he gives permission, and the ground thereby becomes religious even though he should not give his consent to the interment till after it has taken place.

10. Sanctioned things too, such as city walls and gates, are, in a sense, subject to divine law, and therefore are not owned by any individual. Such walls are said to be 'sanctioned', because any offence against them is visited with capital punishment; for which reason those parts of the laws in which we establish a penalty for their transgressors are called sanctions.¹³³

In the above excerpt, it is clear that the redactors of the *Institutes of Justinian* held out a narrow category of property that could be considered sacred and consecrated. Pursuant to Article 8, consecration can only occur through the actions of "God's ministers" and can only apply to things "dedicated to His service." In this regard, it is undisputable that religious cemeteries, which are created by "God's ministers" (i.e., representatives

¹³³ J. INST. 2.1.8–10. The Institutes of Justinian (J.B. Moyle trans. 1913); see also G. INST. 2.6. Mears, The Institutes of Gaius and Justinian, The Twelve Tables and the CXVIIIth and CXXVIIth Novels, with Introduction and Translation 313 (T. Lambert Mears trans. 1882) (using similar language to that in Justinian's Institutes, but authored some 400 or more years before Justinian).

of the church) and are spaces “dedicated to His service,” would have been legally inviolate spaces in Christian Rome, thus creating a custom now a part of Louisiana law nearly 1500 years later.¹³⁴

With regard to other cemeteries, Article 9 appears to hold that the ground in which someone is buried “becomes religious” and, along with other such sacred and religious things listed in Article 10, becomes subject to divine law.¹³⁵ In other words, even for cemeteries not created by the church or its officers, Roman law provides that land used for the interment of human dead “becomes religious” and is thus also inviolate property.¹³⁶ Because the sixth century Romans classified burial sites as religious property, with certain restrictions attendant thereto,¹³⁷ it seems reasonable to assume that this early treatment of burial grounds as deserving of special treatment represents an ancient version of Louisiana’s cemetery dedication, and, indeed, should be considered a direct ancestor of the modern concept and, at a minimum, a source of custom at civil law from which Louisiana’s modern concepts derive.

The ancient Roman origins for Louisiana’s cemetery dedication laws are continued in the Spanish law that was in force in the State during its early years. Volume 1 of *Las Siete Partidas* contains the Spanish law regarding cemeteries that was largely the civil law system in effect when Louisiana was acquired by the United States in 1803.¹³⁸ Certainly by the

¹³⁴ J. INST. 2.1.8.

¹³⁵ J. INST. 2.1.9–10.

¹³⁶ There is also some concept of the inviolate nature of burial spaces in the Twelve Tables, but it is unclear what is actually being restricted. In this regard, Table X, Sec. 11, states “[n]either a tomb nor its enclosure is susceptible of acquisition by use.” Mears, *supra* note 133, at 590. However, it is unclear whether this proscription, reduced to writing in the second century B.C., is a prohibition of acquisitive prescription of interment rights in someone else’s burial space or whether it is a prohibition of the use of cemetery spaces for something other than the burial of the dead. While it is tempting to conclude that the latter interpretation is the correct one, as it would push the cemetery dedication concept back some six centuries prior to Gaius’ Institutes, it is simply unclear what Republican Romans had in mind when they drafted this law.

¹³⁷ This is not to suggest that historic Europeans actually always practiced what they preached. As Iserson has noted, history is replete with stories and evidence of the deconsecration and moving of cemeteries since the time of the *Institutes of Justinian*. KENNETH V. ISERSON, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? 529–33 (1993).

¹³⁸ A.N. Yiannopoulos, *The 20th John M. Tucker, Jr. Lecture in Civil Law: Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 LA. L. REV. 5, 14 (1992) (noting that, though modeled after the structure of the Napoleonic Code, even the substance of much early law in Louisiana was of Spanish origin). It is important to note that a review of the early Louisiana Civil Codes (the Digest of 1808 and the 1825 and 1870 Civil Codes) reveals that, from the time that Spanish law was in force in Louisiana until

time Louisiana was under Spanish dominion (A.D. 1762–1803),¹³⁹ the inviolate nature of cemetery property that appears to have originated in Christian Rome or earlier is cemented in the positive codal law. In this regard, *Las Siete Partidas* contains a prohibition against the use of cemetery property for anything but cemetery uses, thusly: “The churches . . . enjoy certain privileges and extraordinary exemptions. . . . [I]t is proper to speak in this Title of the exemptions and privileges which they, as well as their cemeteries, enjoy.”¹⁴⁰ Explaining that “[a] privilege means a special law,”¹⁴¹ the redactors of *Las Siete Partidas* go on to list prohibited activities in churches and cemeteries, including taxation (of the church or cemetery property), resolution of secular disputes, the conduct of criminal proceedings, and trade.¹⁴² This concept is consistent with the modern principle that dedicated cemetery property cannot be put to noncemetery uses. Early Spanish law also prohibits the alienation of church (and by extension cemetery) property.¹⁴³ Through these protections of cemetery property and prohibitions on the alienation of that property in Roman and Spanish law, it is easy to trace the history of the inviolate nature of cemeteries in civil law traditions through the present, and it is clear that the antecessors to Louisiana law clearly held such lands as specially protected.

As noted above, the retroactive application of law to people’s vested property rights is disfavored, if not outright unconstitutional.¹⁴⁴ However, the fact that cemeteries have been singled out as deserving of special protection as a class of property since at least the sixth century

the enactment of the Louisiana Cemetery Act in 1974, there was no positive codal law in Louisiana related to cemeteries. Further, the French Napoleonic Code also contains no cemetery-specific laws (though this is probably less important for the purposes of this review, as Louisiana was already an American territory by the time of the enactment of the Napoleonic Code).

¹³⁹ Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana*; 1762–1828, 42 LA. L. REV. 1485, 1486–88 (1982) (noting both the dates of Spanish dominion in Louisiana as well as the importance of Spanish legal influences in Louisiana).

¹⁴⁰ LAS SIETE PARTIDAS, VOLUME ONE: THE MEDIEVAL CHURCH, THE WORLD OF CLERICS AND LAYMEN 166 (Samuel Parsons Scott trans. & Robert I. Burns ed. 2001).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 182–88.

¹⁴⁴ Of course, just because such rights impingements are disfavored does not mean that they are illegal. Indeed, the United States and Louisiana Constitutions make provision for such activities by requiring that such property owners be provided “just compensation” if their rights are unreasonably restricted by regulation. U.S. CONST. amend. V, XIV; LA. CONST. ANN. art. I, § 4 (2018).

strongly suggests that no current landowner in Louisiana acquired any of his or her property under circumstances in which a cemetery dedication was nonexistent or to which the application of that law would not occur.¹⁴⁵ Accordingly, requiring that landowners comply with the cemetery dedication in Louisiana regardless of the antiquity of their title or the age of the cemetery on their property is neither unreasonable nor unconstitutional.

IV. TREATMENT OF CEMETERY PROTECTION IN THE LAND USE, PLANNING, HISTORIC PRESERVATION, AND ARCHAEOLOGICAL LITERATURE

The existence of such sweeping cemetery protections as the cemetery dedication, though occasionally discussed in legal literature¹⁴⁶ and appearing a few times per year in the reported jurisprudence in the United States,¹⁴⁷ does not seem to have permeated much of the non-legal academic literature. Though occasionally sources comment on the generally accepted notion of the sanctity of the grave,¹⁴⁸ scholars seldom look beyond the modern environmental and historic preservation movements for sources of such protections. Another especial shortcoming in the existing literature is in the field of archaeology, where much attention is paid to NAGPRA,¹⁴⁹ but little to non-Native burial sites.¹⁵⁰ Baugher and Veit typify this dearth when they observe that, before NAGPRA, there was virtually no protection for burial sites from unauthorized plunder and pillage or even from unintended damage.¹⁵¹ Certainly, NAGPRA was a watershed event in raising the awareness of threats to nontraditional cemeteries in the United States and perhaps worldwide.¹⁵² However, as

¹⁴⁵ See, e.g., *Narragansett Improvement Co. v. Wheeler*, 21 A.3d 430, 433 (R.I. 2011) (noting that cemeteries are merely a condition of the property much like a hill or a stream).

¹⁴⁶ J. Dwight Tom, *Easement Come, Easement Go—The Cemetery Access Easement: The Exception to the Right to Exclude Whose Time Has Come to Facilitate the Preservation of Nineteenth-Century Texas Family Cemeteries*, 39 ENVIRONS: ENVTL. L. & POL'Y J. 173, 185 (2016).

¹⁴⁷ See, e.g., Seidemann, *How Do We Deal With All the Bodies?*, *supra* note 38, at 17.

¹⁴⁸ See, e.g., KEN WORPOLE, *LAST LANDSCAPES: THE ARCHITECTURE OF THE CEMETERY IN THE WEST* 155 (2003) (attributing this concept to the much more recent trend of fear of grave robbing in the eighteenth and nineteenth centuries than to ancient Rome).

¹⁴⁹ See generally Lippert, *supra* note 8, at 3–4; Fine-Dare, *supra* note 8, at 4.

¹⁵⁰ Seidemann, *NAGPRA at 20*, *supra* note 9, at 203.

¹⁵¹ Sherene Baugher & Richard F. Veit, *THE ARCHAEOLOGY OF AMERICAN CEMETERIES AND GRAVEMARKERS* 25 (2014) (citing Price, *supra* note 46, at 4, 11, 18).

¹⁵² Seidemann, *NAGPRA at 20*, *supra* note 9, at 203–04; Ryan M. Seidemann, *Bones of*

is clear from the above review, NAGPRA was neither the panacea protection legislation for all burial sites nor was it the earliest such protection.

DISCUSSION AND CONCLUSION

It is apparent that, in recent years, most planning scholars, lawyers, and legislators have looked back only as far as the 1960s when looking for both mechanisms to regulate the protection of cemeteries and for mechanisms to limit the use of certain historically important property. This myopic approach may seem logical, as both the modern environmental movement began in the late 1960s with the primary laws related to the protection of the environment and historic properties enacted in 1970 and 1966,¹⁵³ respectively, and the funeral industry came under close scrutiny following the publication of Mitford's book.¹⁵⁴ However, it appears that, at least in Louisiana, when dealing with cemeteries, the inquiry should be temporally deeper.

Based upon this review, it is further apparent that while the object of modern environmental and historic preservation laws may have been to protect sites, cemeteries have never fit well or easily into the modern milieu of such laws. The existence of the cemetery dedication makes apparent that perhaps it is unnecessary to attempt to fit a round peg into a square hole to ensure the protection of cemetery sites under the guise of protecting the environment or preserving history. Indeed, it is well known that the protections afforded by most twentieth century environmental and historic preservation laws are only relative protections at best.¹⁵⁵ In this regard, while a developer may have to "consider" the impacts of a project on a historic structure or an archaeological site before demolishing that structure or site,¹⁵⁶ the developer has no option but to avoid a cemetery or to fully mitigate the impacts to that site in order to be in compliance with the cemetery dedication laws.¹⁵⁷

What does all of this mean from a planning perspective? It means that planners need to pay close attention to the locations of historic cemeteries, whether they are visible on the ground surface or not (the

Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries, 64(3) LA. L. REV. 545, 559 (2004).

¹⁵³ See National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2018); National Historical Preservation Act, 54 U.S.C. § 100101 (2018).

¹⁵⁴ MITFORD, *supra* note 75. See SLOANE, *supra* note 75, at Part IV.

¹⁵⁵ Seidemann & Moss, *supra* note 6, at 453.

¹⁵⁶ *Id.* at 454.

¹⁵⁷ LA. STAT. ANN. §§ 8:304–07 (2018).

latter scenario presenting its own logistical complexities). The discovery of such sites during the construction process can lead to complete project redesigns or vast cost overages. Certainly, planners and developers could simply not report the presence of a cemetery and thereby avoid considerable logistical and cost problems. However, experience has shown that, in most cases, whether there are markers present in a cemetery or not, someone in the community knows about the existence of the cemetery and will have no qualms about reporting the possible disturbance of the property to the authorities. What this research means for other jurisdictions is perhaps that they have been looking in the wrong place when trying to protect cemetery sites. Certainly, Louisiana has been at the forefront for many years in the enactment of special legislation designed to protect and preserve burial sites.¹⁵⁸ However, while that legislation has accomplished the goal of professionalizing the disinterment process required for the removal of the cemetery dedication, it was not particularly necessary for the protection of the site itself. Virtually every state in the nation has a concept of the cemetery dedication in its law. While the specific language of any particular law will certainly vary from state to state, there is still a high likelihood that stronger and more absolute protections exist for cemeteries in these antiquated and often forgotten enactments.

¹⁵⁸ See, e.g., LA. STAT. ANN. §§ 8:671 *et seq.*, 25:931 *et seq.*, 25:951 *et seq.* (2018).