

PLACES WORTH SAVING: A LEGAL GUIDE TO THE PROTECTION OF HISTORIC CEMETERIES IN LOUISIANA AND RECOMMENDATIONS FOR ADDITIONAL PROTECTION

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I. INTRODUCTION¹

Significant evidence of our shared cultural heritage is fading before our eyes, a victim to development and various forms of destruction.² Historic cemeteries are among the many historical and archaeological sites threatened today.³ The issues facing historical and archaeological sites are a product of poorly understood state law and the virtual absence of federal law protecting historic cemeteries.

Most cultures consider cemeteries sacred spaces.⁴ These spaces contain the physical remains of human beings—generally the ancestors of a community—and are held to be inviolate in nature by many.⁵ However, the inviolate nature of cemeteries is becoming less paramount in the Western world, and preservation of human remains does not always win out in the “march of progress” when cemeteries are in the way of the living’s expansion plans.⁶ It is precisely this “march of progress” that now threatens these sacred and historically important sites; the protection of these sites is the subject of this Article.

1. The views and opinions expressed herein are solely those of the authors and do not necessarily represent the position of the Louisiana Department of Justice or the Attorney General. The authors wish to thank Ericka Seidemann for her critical review of a previous draft of this article. All errors and omissions remain the sole responsibility of the authors. The support for the research for this article was provided solely by the authors. Reprint requests should be directed to Seidemann at rseidem@yahoo.com.

2. See generally LOUISIANA DEPARTMENT OF CULTURE, RECREATION, AND TOURISM, OFFICE OF CULTURAL DEVELOPMENT, DIVISIONS OF ARCHAEOLOGY AND HISTORIC PRESERVATION, LOUISIANA COMPREHENSIVE HISTORIC PRESERVATION PLAN, <http://www.crt.state.la.us/hp/Complan2001.pdf>. See also Tanya Kenevich, *History Defaced: Stories of Cemetery Vandalism*, AM. CEM. 10 (Dec. 2008); Virginia H. Murray, *A “Right” of the Dead and a Charge on the Quick: Criminal Laws Relating to Cemeteries, Burial Grounds and Human Remains*, 56 J. Mo. B. 115 (March/April 2000).

3. Associated Press, *Phillis Wheatley Elementary and St. Louis Cemetery No. 2 Among Threatened Landmarks on Global Watch List*, http://www.nola.com/news/index.ssf/2009/10/new_orleans_cemetery_school_am.html (discussing threatened nature of at least one New Orleans cemetery).

4. JESSICA MITFORD, *THE AMERICAN WAY OF DEATH* 97-98 (1963).

5. The inviolate nature of human burial sites has been demonstrated by both federal and state laws in the past twenty years. See, e.g., Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3010 (2006) [hereinafter NAGPRA]; Louisiana Unmarked Human Burial Sites Preservation Act, LA. REV. STAT. ANN. § 8:671 (2005) [hereinafter Unmarked Burials Act]. This concept is also carried forward by the Louisiana jurisprudence. See *Travelers Ins. Co. v. Welsh*, 82 F.2d 799, 801 (5th Cir. 1936) (commenting that, “a body once suitably buried ought to remain undisturbed except for necessary or laudable reasons.”). The Fifth Circuit also notes that “[t]he public law also has very rigorously guarded the grave.” *Id.* at 803 (citing *U.S. Fid. & Guar. Co. v. Hood*, 87 So. 115 (Miss. 1921)).

6. See generally DAVID C. SLOANE, *THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY* (1995).

With the constant growth of Western society, many cemeteries are seen as nothing more than valuable property, wasting away beneath concrete blocks and fading superstitions.⁷ Too often, developers resort to demolishing cemeteries altogether or simply removing what they can before they build on top of the remains.⁸ Additionally, looters cause other forms of destruction and desecration.⁹ Further, even well-intentioned preservationists cause substantial damage to cemeteries because they are unaware of proper conservation methods and lack any regulatory control.¹⁰ On a national level, cemeteries are destroyed due to disrepair and abandonment, when the owners of the land simply overlook the needs of cemeteries and leave them to the hands of time and Mother Nature, resulting in vandalism and erosion.¹¹

Although developers, looters, and careless owners are greatly to blame for the problems that our historical cemeteries face, they are not alone.¹² Lawmakers have generally, though likely inadvertently, ignored cemeteries, leaving such sites without adequate protection and regulation to safeguard against destruction.¹³ Such protection could come, as it should and occasionally does in Louisiana, in the form of permitting requirements, laws, and other regulations to keep developers at bay and looters away, while giving landowners guidelines to properly restore the history that rests on and under their property.¹⁴ While protection does exist for cemeteries falling into specified categories, many traditional historic cemeteries remain under-protected.¹⁵

Nonetheless, in American culture in general and in Louisiana in particular, there is currently a generally-held sanctity for cemeteries.¹⁶ The

7. See Carl Zollmann, *Church Cemeteries in the American Law*, 14 MICH. L. REV. 391, 391 (1916).

8. *Id.*

9. Michael J. Bushbaum, *Beyond ARPA: Filling the Gaps in Federal and State Cultural Resource Protection Laws*, 23 ENVTL. L. 1353 (1993) (noting problems of looting in a California cemetery); see also Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487 (2005-2006).

10. See TOMB IT MAY CONCERN: SAVE OUR CEMETERIES TOUR GUIDE TRAINING MANUAL 44 (Rachel Witwer, ed., 2008) [hereinafter TOMB IT MAY CONCERN] (commenting on the threats to cemeteries from both development and ill-executed preservation efforts).

11. Clark, *supra* note 9, at 514.

12. *Id.*

13. *Id.* at 530-33.

14. One example issued by the state for work in a known cemetery is the permit to put in the Katrina Memorial in Charity Hospital in New Orleans under the permitting authority bestowed by La. R.S. § 8:671. LA. REV. STAT. ANN. 8:671 *et seq.* (2009).

15. See, e.g., NAGPRA, *supra* note 5; Unmarked Burials Act, *supra* note 5.

16. Samuel Wilson, *Introduction*, in NEW ORLEANS ARCHITECTURE VOLUME III: THE

review undertaken in this Article is thus through the lens of the Louisiana cemeteries, though many of the concepts and recommendations herein will be applicable to other jurisdictions.

Louisiana is the basis for this Article for several reasons. First, as a result of the unique nature of many south Louisiana cemeteries, especially the opulent above-ground crypts and mausoleums in New Orleans, citizens are generally cemetery-conscious and cemetery-proud.¹⁷ This consciousness and pride fosters a protectionist attitude among Louisiana's citizens that is embodied in the state's laws.¹⁸ Second, recent disasters that have impacted Louisiana, particularly Hurricanes Katrina and Rita in 2005, shed new light on acute problems relevant to cemeteries' preservation: what to do with cemeteries that are impacted by non-anthropogenic forces.¹⁹ Finally, because Louisianans commonly live and work with cemetery matters, our appreciation of the issues affecting these sites' preservation is more comprehensive than that in other jurisdictions.

II. EXISTING LEGAL PROTECTIONS FOR CEMETERIES OR LACK THEREOF

A. FEDERAL PROTECTIONS

1. NATIONAL ENVIRONMENTAL POLICY ACT

The role of the National Environmental Policy Act (NEPA) in historic preservation efforts has been documented at length by numerous other scholars.²⁰ Accordingly, only a brief overview is included here. In a broad sense, NEPA is the gateway legislation for virtually all federal environmental and historic preservation legislation.²¹ The National Historic Preservation Act (NHPA) and other laws like it find their authority through

CEMETERIES at ix-x (Mary L. Christovich, ed., 1997).

17. See generally ROBERT FLORENCE, *NEW ORLEANS CEMETERIES: LIFE IN THE CITIES OF THE DEAD* (1997). See also Larry Bleiberg, *New Orleans' Past is Paydirt*, in BRYAN WOOLLEY ET AL., *FINAL DESTINATIONS: A TRAVEL GUIDE FOR REMARKABLE CEMETERIES IN TEXAS, NEW MEXICO, OKLAHOMA, ARKANSAS, AND LOUISIANA* 171 (2000).

18. See generally LA. REV. STAT. ANN. §§ 8:1-8:906 (2005).

19. See Ryan M. Seidemann, *Sisters of Destruction: The Effects of Hurricanes Katrina and Rita on Louisiana's Cemeteries*, 1(3) EPITAPHS 22 (2006) [hereinafter *Sisters of Destruction*].

20. See, e.g., Wesley Kobylak, *Annotation Application and Construction of § 106 of the National Historic Preservation Act of 1966 (16 U.S.C.A. § 470f), dealing with federally sponsored projects which affect historic properties*, 68 A.L.R. Fed. 578 (1984). See also THOMAS F. KING, *FEDERAL PLANNING AND HISTORIC PLACES: THE SECTION 106 PROCESS* (2000) [hereinafter *FEDERAL PLANNING AND HISTORIC PLACES*].

21. THOMAS F. KING, *CULTURAL RESOURCE LAWS & PRACTICE: AN INTRODUCTORY GUIDE* 35-36 (1998) [hereinafter *CULTURAL RESOURCE LAWS & PRACTICE*].

NEPA's required environmental analyses.²² However, NEPA only applies to federal actions, permits, and expenditures.²³ Thus, if a project only involves state, local, or private actions, and requires only permits or funding, NEPA (and thus, NHPA) does not apply. Regardless, as triggering legislation for NHPA, NEPA does play an important role in cemetery protection at the federal level.

2. NATIONAL HISTORIC PRESERVATION ACT

In 1966, Congress enacted NHPA²⁴ to bolster protections of important historic properties.²⁵ Unfortunately, NHPA, while creating a significant amount of paperwork for federal and state agencies, does little to actually protect historic properties. The reason for this lack of protection largely stems from the following language in Section 106 of the NHPA, which provides:

[P]rior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, *take into account* the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.²⁶

NHPA provides that when federal funding (or via NEPA, federal permitting or actions) is involved in a project, National Register-listed and eligible properties must be "considered" before the project goes forward.²⁷ There is no requirement that the project be redesigned to ensure the protection of such sites or even to mandate mitigation of such activities' impacts on sites. Admittedly, these protections may be bolstered by federal agencies permitting various activities by mandating mitigation or avoidance as a requirement of another permit, but this leaves the protection of sites in the discretion of the federal government, a potentially disappointing prospect.²⁸

22. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006). Sec. 101(b) requires "consideration" of historic resources; this provision triggers NHPA. *Id.* § 4331(b).

23. Kobylak, *supra* note 20, § 12(a).

24. National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2006).

25. 16 U.S.C. § 470(b)(7) (2006) ("[I]t is . . . appropriate for the Federal Government to accelerate its historic preservation programs and activities . . .").

26. *Id.* § 470f (emphasis added).

27. *See Boyd v. Roland*, 789 F.2d 347 (5th Cir. 1986) (stating that "eligible" properties do not have to have been "officially eligible" for inclusion in the National Register). *See also* 36 C.F.R. § 800.1(a) (2006) ("[S]ection 106 of the [NHPA] requires Federal agencies to take into account the effects of their undertakings on historic properties . . .").

28. THOMAS F. KING, *SAVING PLACES THAT MATTER: A CITIZEN'S GUIDE TO THE NATIONAL HISTORIC PRESERVATION ACT 61-72* (2007) [hereinafter *SAVING PLACES THAT MATTER*].

In practice, eligible and listed sites are often avoided or mitigated during the course of such projects.²⁹ However, cemeteries occupy a unique position of disregard under the NHPA, making it more difficult for those interested in protecting them to actually do so.

Under the NHPA, “ordinarily cemeteries . . . or graves of historical figures . . . shall not be considered eligible for the National Register.”³⁰ While discussing numerous arguments for how cemeteries may be considered eligible for National Register listing, Thomas King notes that “[i]f you want a cemetery to be regarded as eligible, you have to be pretty slow to be unable to find a way to make it so.”³¹ In fact, however, there are very few “traditional” cemeteries listed on the National Register.³²

What, then, is to be done with the isolated, abandoned cemetery that does not gain protection from federal laws?³³ This is where the lacuna exists under the federal law that this Article attempts to address through a review of Louisiana’s cemetery laws. In addition to this lacuna, the minimal protections that actually do exist under federal law are not very helpful.

3. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

In 1990, Congress passed the Native American Graves Protection and

29. Indeed, avoidance and/or mitigation are favored under the NHPA regulations. 36 C.F.R. § 800.6(A) (2006). See also William L. Want, *The Permit Process*, in LAW OF WETLANDS REGULATION § 6:72 (2009) (commenting on the costly nature of mitigation and that most projects will make efforts to avoid NR eligible sites to save money).

30. 36 C.F.R. § 60.4(d) (2006).

31. CULTURAL RESOURCE LAWS & PRACTICE, *supra* note 21, at 81.

32. As of February 4, 2009, only 21 of the 1,324 Louisiana sites listed on the National Register were cemeteries (1.6%), excluding even many of the famous New Orleans cemeteries. See National Register Information System, <http://www.nr.nps.gov/> (follow “Location” hyperlink; then enter “LA”).

33. A good example of what generally constitutes an isolated or abandoned cemetery is set forth in *Thomas v. Mobley*, 118 So. 2d 476 (La. App. 1 Cir. 1960), to wit:

the graveyard, although readily distinguishable from the surrounding pasture, had become overgrown with briar and thickets and small trees; that, with at the most one or two exceptions, all of the wooden and tin grave markers had deteriorated and become displaced through action of the weather and of wandering cattle; and that some of the comparatively small number . . . of stone or marble tombstones had been knocked over or become obscured by the undergrowth.

Thomas v. Mobley, 118 So. 2d 476, 478 (La. App. 1 Cir. 1960). However, not all abandoned cemeteries are necessarily isolated or in rural areas. See, e.g., Karen Kruse, *The Parking Lot Cemetery* 32 AGS Q. 8 (2008) (discussing an abandoned cemetery in the middle of a suburban strip mall parking lot in Illinois). See also E. Katie Holm, *The Revival of Atkinson Cemetery, Cottage Grove, Washington County, Minnesota*, 29 AGS Q. 7 (2005) (discussing an abandoned cemetery near a McDonald’s outside Minneapolis).

Repatriation Act (NAGPRA).³⁴ NAGPRA sets forth a mechanism for the return and reburial of certain Native American skeletal remains and sacred objects from museum and university collections across the United States, as well as providing for the protection of *in situ* remains.³⁵ NAGPRA applies to Native American³⁶ human remains in two contexts: one, curated remains housed in museums or other institutional collections that receive federal funding³⁷ and, two, remains found on federal or tribal lands.³⁸

As mentioned, NAGPRA applies to Native American remains discovered on federal and tribal lands; it also applies to objects of cultural patrimony discovered on those lands.³⁹ The Act applies if such remains are found after NAGPRA's enactment date;⁴⁰ further, NAGPRA prioritizes the order of such items' right of possession. If lineal descendants can be associated with the items, those individuals hold the primary position of possession.⁴¹ However, where direct lineal descendants cannot be identified, a tripartite scheme of possession determination is employed:

(A) the ownership shall be "in the Indian tribe . . . on whose tribal land such objects or remains were discovered;"⁴²

(B) the ownership shall be "in the Indian tribe . . . which has the closest cultural affiliation with such remains or objects and which,

34. 25 U.S.C. §§ 3001-3010 (2006).

35. Francis P. McManamon, *The Reality of Repatriation: Reaching Out to Native Americans*, in IMPLEMENTING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (Roxana Adams, ed., 2001). The federal legislation that was NAGPRA was not the first statement by legislatures in the United States on the treatment of Native American human remains. It was preceded by the National Museum of the American Indian Act (NMAIA), 20 U.S.C. § 80q (2006), which covered repatriation of the Smithsonian Institution's collections. Additionally, a few states issued burial protection laws prior to 1990. See, e.g., MO. REV. STAT. §§ 194.400-410 (2004). See H. Marcus Price, *Bones of Contention: Reburial of Human Remains Under RS MO. 194.400-410*, 5 MO. ARCHAEOLOG. SOC. Q. 4 (1988).

36. Native Americans under NAGPRA include Native Americans, Native Hawaiians, and Alaskan Inuits. 25 U.S.C. § 3001(9) (2006).

37. 25 U.S.C. § 3005 (2006).

38. *Id.* § 3002.

39. *Id.* § 3003.

40. For the purposes of NAGPRA, "federal lands" means:

any land other than tribal lands which are controlled and owned by the United States, including the lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

25 U.S.C. § 3001(5) (2006). "Tribal land" means:

(A) all lands within the exterior boundaries of any Indian reservation; (B) all dependant Indian communities; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

Id. § 3001(15).

41. *Id.* § 3002(a)(1).

42. *Id.* § 3002(a)(2)(A).

upon notice, states a claim for such remains or objects; or”⁴³

(C) “if the cultural affiliation . . . cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe,”⁴⁴ then

(1) the ownership shall be “in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon such notice, such tribe states a claim for such remains or objects. . . .”⁴⁵

(2) ownership shall be “in the Indian tribe that has the strongest demonstrated relationship” if it can be shown “by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects. . . .”⁴⁶

Importantly, these provisions and the means for identifying affiliation only apply to remains or objects discovered after November 16, 1990, and not to remains and objects already curated by that date.⁴⁷ Additionally, this scheme does not restrict the excavation of remains or the disturbance of Native American cemeteries after November 16, 1990; it just sets in place a mechanism for determining who ultimately controls the remains.⁴⁸ Finally, for remains that are not claimed by a group identified under 25 U.S.C. § 3002, NAGPRA provides no guidance as to disposition.

4. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979 (ARPA)

The stated purpose of ARPA is, in pertinent part, to “secure . . . the protection of archaeological resources and sites which are on public lands. . . .”⁴⁹ Many cemeteries are also considered to be archaeological sites to which ARPA would apply.⁵⁰ ARPA is intended to protect against one thing: pothunting.⁵¹ Congress has identified the threats to such

43. 25 U.S.C. § 3002(a)(2)(B) (2006).

44. *Id.* § 3002 (a)(2)(C).

45. *Id.* § 3002 (a)(2)(C)(1).

46. *Id.* § 3002 (a)(2)(C)(2).

47. *See generally* § 3002(a) (stating that NAGPRA only applies to remains or objects discovered after November 16, 1990).

48. 25 U.S.C. § 3002(a) (2006).

49. 16 U.S.C. § 470aa(b) (2006).

50. *See generally* *United States v. Lynch*, 233 F.3d 1139 (9th Cir. 2000). *See also* Dan Silverboard, Note, *Recent Developments in Environmental Law*, 14 TUL. ENVTL. L.J. 597, 611-13 (2001).

51. Ryan M. Seidemann, *The Reason Behind the Rules: The Archaeological Resources*

archaeological materials and sites as “their commercial attractiveness”⁵² and inadequate protection from destruction due to “uncontrolled excavations and pillage.”⁵³ Thus, although this law may provide some protection for certain cemeteries, its main aim was not to protect cemeteries.

The regulations promulgated under ARPA require that activities impacting archaeological sites on federal lands are undertaken pursuant to a permit process.⁵⁴ The regulations for ARPA are limited, however, in their potential application to historic cemeteries: the archaeological site to be protected must be older than 100 years in order to trigger ARPA.⁵⁵ Although this stipulation will likely catch many historic cemetery sites,⁵⁶ it is possible that some such cemeteries are less than 100 years old or that portions of older cemeteries are not yet 100 years old, thus calling into question the applicability of ARPA to the entire site.⁵⁷ Nonetheless, what protections may exist under ARPA are subject to the federal government permitting and do not necessitate further discussion here.

5. SECTION 4(F)

In addition to NEPA and the NHPA, Congress has enacted special preservation legislation for situations when federal road construction is involved.⁵⁸ Known as “Section 4(f),” the parks and historic preservation provisions of the Federal-Aid Highways Act has been famously used to prevent the federal government from developing a highway through a beloved Memphis park.⁵⁹ However, no reported case exists on the

Protection Act of 1979 and Scientific Study, 13 B.U. J. SCI. & TECH. L. 193, 197 (2007). The Oxford English Dictionary defines a “pothunter” as “[o]ne who finds or obtains objects of archaeological interest or value, esp. by unscientific or illicit methods, and for the purpose of private collection or profit.” Oxford English Dictionary Online Edition, <http://dictionary.oed.com>, last visited June 15, 2007 (enter search term “pothunter,” subscription required).

52. 16 U.S.C. § 470aa(a)(2) (2006).

53. *Id.* § 470aa(a)(3).

54. CULTURAL RESOURCE LAWS & PRACTICE, *supra* note 30, at 197.

55. 43 C.F.R. § 7.3(a) (2007).

56. Prehistoric cemeteries are less of a concern for protection under ARPA since the passage of NAGPRA in 1990, which will apply to most (if not all) prehistoric cemeteries on federal and tribal land in the United States.

57. It is important to note that the national cemeteries, which are often classified as federal land, are likely not in jeopardy of being destroyed due to the fact that interments still occur on these properties, which contain many burials that are more than 100 years old. Activities in and management of these cemeteries are specifically provided for by law such that there is little room for disturbance of the national cemeteries. See 38 U.S.C. § 2400-2500 (2006) (establishing the National Cemetery Administration within the Department of Veterans Affairs).

58. Pub. L. No. 89-574, 80 Stat. 766 (1966) (*amended by* Pub. L. No. 90-495, 82 Stat. 815 (1968)).

59. See generally *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

effectiveness of this Act in cemetery preservation. Despite this lack of a judicial test, the plain language of Section 4(f), codified at 23 U.S.C. 138, does provide some hope that cemeteries may be protected from federal projects by the law, to wit:

. . . the Secretary [of the U.S. Department of Transportation] shall not approve any program or project . . . which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.⁶⁰

As noted by Olesh, Section 4(f), as enacted, provides a strong mandate to the federal government to minimize impacts to historic sites (which presumably would include cemeteries).⁶¹ Indeed, Yahr notes that Section 4(f) is even more useful in the preservation of historic sites than NEPA, because:

While NEPA dictates the procedure for federally funded construction projects affecting public resources, section 4(f) is substantive. It provides the Secretary of Transportation with explicit instruction of what considerations to make when the projected impacts use certain public resources. If a project fails to meet section 4(f)'s requirements, it is ineligible to receive federal funding.⁶²

Unfortunately, Section 4(f) is of limited utility for cemetery protection and preservation. As Olesh correctly notes, the courts and the federal agencies have undermined and weakened the strong language of Section 4(f).⁶³ Further complicating the utility of Section 4(f) for cemetery preservation is the reality that it only applies to federal road projects.⁶⁴ Thus, state and local projects do not trigger the protections of Section 4(f),

60. 23 U.S.C. § 138(a) (2006).

61. Stanley D. Olesh, *The Roads Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 WM. & MARY L. REV. 155, 155-57 (1986).

62. Megan A. Yahr, *The I-70 Mountain Corridor Expansion Project: Does the Department of Transportation Act of 1966 Apply?*, 32 TRANSP. L.J. 313, 315-16 (2005) (internal citations omitted).

63. See generally, Olesh, *supra* note 61.

64. See *Vill. of Los Rancheros de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480-85 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

nor do the emerging threats from private development.

B. STATE PROTECTIONS

At the state level in Louisiana, the laws that deal with cemeteries are contained in Title 8, Title 14, and Title 41 of the Revised Statutes. According to Title 8, a “cemetery” is defined 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.⁶⁵

Further, the term “burial” means “the placement of human remains in a grave”;⁶⁶ while a “grave” is defined as “a space of ground in a cemetery used or intended to be used for burial.”⁶⁷

In a broad sense, the cemetery protections in Title 8 largely relate to operating cemeteries, with the exception of the Louisiana Unmarked Human Burial Sites Preservation Act.⁶⁸ The Title 14 protections are strictly aimed at criminalizing cemetery desecration. The protections for cemeteries contained in Title 41 exist by virtue of their classification as state land and thus only apply when they are located on state land.⁶⁹ None of this law is particularly aimed at the protection of cemeteries as historic resources. Instead, Title 8 is aimed at regulating the cemetery industry, and Title 41 (along with Chapter 10-A of Title 8) is aimed at protecting archaeological sites to the extent possible under constitutional constraints.⁷⁰ Therefore, these three portions of Louisiana law can be cobbled together to afford some protection for cemeteries’ historic integrity.

1. LOUISIANA CEMETERY BOARD

The Louisiana Cemetery Board (LCB) was originally established through Act 417 of the 1974 Louisiana Legislature. The LCB consists of seven members, appointed by the Governor and approved by the Senate, including a member from each public service commission district, and meets at least two times per year.⁷¹ The LCB is responsible for licensing

65. LA. REV. STAT. ANN. § 8:1(7) (2009).

66. *Id.* § 8:1(2).

67. *Id.* § 8:1(24).

68. *See generally* LA. REV. STAT. ANN. §§ 8:1-2 (2009). *See also* LA. REV. STAT. ANN. §§ 8:671-681 (2009).

69. LA. REV. STAT. ANN. §§ 41:1601-1602.

70. The constitutional constraints in such situations are those related to the protection of private property embodied in U.S. CONST. amend. V, XIV and LA. CONST. art. I, §§ 2, 4.

71. LA. REV. STAT. ANN. § 8:61 (2009).

cemetery authorities, cemetery sales, and management organizations, as well as registering or cataloging exempt authorities.⁷² The LCB also monitors multiple funds and provides assistance to consumers, both through handling informational inquiries and the mediation of consumer complaints.⁷³

No person can operate a cemetery without a valid, unsuspended, and existing “certificate of authority,” which the LCB is responsible for issuing.⁷⁴ The LCB requires that the cemetery authority submit an application for the certificate in writing along with a fee of five hundred dollars.⁷⁵ Following the submitted application, the Board will then determine if all parties involved in the cemetery’s operation are of good business character, including a finding that they are financially responsible as well as trustworthy.⁷⁶ The ultimate goal is to ensure that only cemeteries that represent a permanent benefit to the community are located and established in Louisiana.⁷⁷

If at any time the LCB finds that a licensed cemetery is not being managed or operated properly, it may choose to suspend or revoke the certificate of authority as well as institute legal proceedings to deny the right of operation and business for that cemetery.⁷⁸ As an alternative punishment, the LCB may impose a fine in the amount of up to ten thousand dollars for each violation, upon the certificate holder.⁷⁹

The LCB also maintains regulations for the sale or transfer of ownership of a cemetery by requiring that the original owner return its certificate of authority within thirty days of the transaction, at which time it loses its authority.⁸⁰ The new owner must submit an application for certificate of authority during that time, for which the LCB will follow the

72. LA. REV. STAT. ANN. §§ 8:71-8:76 (2009).

73. *See generally id.* §§ 8:61-8:78.

74. *Id.* § 8:72.

75. *Id.* § 8:70.

76. *Id.* § 8:71.

77. *Id.* § 8:71.

78. LA. REV. STAT. ANN. § 8:75 (2009). *See also* Restlawn Park Cemetery, Inc. v. La. Cemetery Bd., 611 So. 2d 835 (La. Ct. App. 4 Cir. 1992); State v. Twin Cities Mem’l Gardens, Inc., 43,568 (La. Ct. App. 2 Cir. 9/17/08); 997 So. 2d 16. In both of these cases, the LCB’s authority to shut down cemeteries operating in violation of Title 8 was roundly rejected. However, new legislation enacted in 2008, specifically, Act 541, has clearly given the LCB authority to so act, a fact that was recognized by the Second Circuit. *See generally Twin Cities*, 997 So. 2d at 16.

79. LA. REV. STAT. ANN. § 8:75 (2009).

80. *Id.* § 8:76.

same steps discussed above for issuance of the certificate.⁸¹

Thus, the LCB largely serves to regulate the operation of cemeteries by establishing a procedure for issuing licenses to cemetery owners or authorities. The LCB does not act as a historic preservation enforcement authority, nor does it have the statutory authority to do so. Nevertheless, with the statutory charge to enforce the law of Title 8, the LCB is sometimes forced into this role.⁸²

2. TITLE 8⁸³ AND HISTORIC PRESERVATION—EXISTING PROTECTIONS AND THEIR PROBLEMS

Aside from the LCB's regulatory duties over operating cemeteries in Louisiana, there are some portions of Title 8 that constitute what could be considered historic preservation laws. Although the LCB has the authority to enforce all of Title 8,⁸⁴ it is doubtful that a board charged with industry regulation is the proper entity to exercise this authority. It is simply not the bailiwick of the LCB to be involved in historic preservation—its main charge is industry regulation, and it is not equipped to handle historic preservation matters. That said, until legislative changes emerge, the LCB, through the Attorney General, has this charge, making the relevant provisions worth review.

a. Restoration of Specific Grave Spaces in Regulated Cemeteries I: La. R.S. § 8:308

Abandonment and demolition of cemetery spaces are considered in Louisiana Revised Statutes title 8, section 308 (La. R.S. § 8:308).⁸⁵ As to abandonment, there are two different sets of rules. In parishes with a population that exceeds 500,000, La. R.S. § 8:308(B) applies.⁸⁶ Other, smaller, parishes are bound by the rules relating to abandonment in La. R.S. § 8:308(C).⁸⁷ The major difference between these two provisions is the amount of time that must elapse before a cemetery space may be considered abandoned. Under La. R.S. § 8:308(B), the time is ten years; under La.

81. LA. REV. STAT. ANN. § 8:76 (2009).

82. *See, e.g.*, Letter from Ryan M. Seidemann, Assistant Attorney General, Louisiana Department of Justice to Reverend Donovan J. Labbé, St. Nicholas Catholic Church (Apr. 16, 2007) [hereinafter Letter to Labbé] (on file with authors).

83. Reference to Title 8 from this point forward is exclusive of the Louisiana Unmarked Human Burial Sites Preservation Act (Unmarked Burials Act), which is referred to specifically as the Unmarked Burials Act where appropriate.

84. LA. REV. STAT. ANN. § 8:69 (2009).

85. *Id.* § 8:308.

86. *Id.* § 8:308(B).

87. *Id.* § 8:308(C).

R.S. § 8:308(C), the time is twenty-five years.⁸⁸ Presumably, though it is not articulated anywhere, this statute was divided by population size with a reality in mind that larger population centers may have a need to reuse cemetery spaces more often (i.e., they would need a higher turn-over rate) than rural areas based on sheer numbers of people dying within those jurisdictions.⁸⁹ Interestingly, the shorter duration for abandonment in the high population parishes is limited in La. R.S. § 8:308(B) to municipal, religious, and nonprofit cemeteries. This degree of specificity in La. R.S. § 8:308(B) was likely intended to exclude private, for-profit cemeteries from the shorter abandonment period, even in the larger population areas.

As to the process for declaring a cemetery space abandoned, the rules set forth in La. R.S. § 8:308(B) and (C) are fairly straightforward. Under La. R.S. § 8:308(B), in parishes of 500,000 or more, a cemetery space may be deemed abandoned and resold if it has been abandoned-in-fact for more than ten years.⁹⁰ All other cemetery spaces in the state must be abandoned-in-fact for more than twenty-five years, during which time “diligent efforts” must be made to locate the successors of the deceased before a resale can occur.⁹¹ Alternatively, if a space has been abandoned for twenty-five years when “diligent efforts” begin, the cemetery authority need only make such efforts for one year and make the necessary advertisements required by La. R.S. § 8:308(C). It is important to note that the provisions of La. R.S. § 8:308 do not allow the time delays to be truncated because a space has been abandoned-in-fact for the requisite number of years. The time delays run from compliance with the notice requirements.⁹²

Based on the language in La. R.S. § 8:308(A), it is apparent that the abandonment rules apply to any party, natural or juridical, that is covered by the definition of a “cemetery authority.”⁹³ In effect, this rule refers to

88. Compare § 8:308(B) with § 8:308(C).

89. It should be noted that, though the thought may be abhorrent to some, the reuse of grave spaces is permitted by law in Louisiana. See, e.g., LA. REV. STAT. ANN. § 8:1(36.1) (2009); LA. REV. STAT. ANN. § 8:659 (2006); LA. REV. STAT. ANN. § 8:660 (2009). This practice, at least in the southern part of the state, was inherited from our ancestors on the European continent when cemetery spaces were at a premium and concepts related to the inviolate nature of those spaces were more lax than they are today. See, e.g., KEN WORPOLE, LAST LANDSCAPES: THE ARCHITECTURE OF THE CEMETERY IN THE WEST 65 (2003) (discussing the problems of overcrowding in traditional European graveyards).

90. The reselling can only be done after advertising the intent to sell in the official journal. LA. REV. STAT. ANN. § 8:308(B) (2009).

91. *Id.* § 8:308(C).

92. In addition, because of the unique nature of cemeteries in Louisiana property law, it is doubtful that the Civil Code rules on property abandonment do not apply to cemeteries.

93. LA. REV. STAT. ANN. § 8:1(9) (2009). Section 8:1(9) defines “cemetery authority” as any person, firm, corporation, limited liability company, trustee, partnership, association or municipality owning, operating, controlling or managing a cemetery or

any entity that runs a cemetery in the state.

Before reaching a discussion of the portions of Title 8 that deal with repair and renovation of cemetery spaces, it is important to note that La. R.S. § 8:308(B) clearly states that abandoned cemetery spaces may not be demolished. It is unclear why this restriction is not contained within La. R.S. § 8:308(C), but this omission is likely of little import, as demolition is strictly prohibited under La. R.S. § 8:903, regardless of the parish population size in which the cemetery is located.

**b. Restoration of Specific Grave Spaces in Regulated Cemeteries II:
La. R.S. § 8:903 and La. R.S. § 8:903.1**

The repair, renovation, and resale of cemetery spaces that are more than fifty years old is provided for in Louisiana Revised Statutes title 8, sections 903 and 903.1 (La. R.S. § 8:903 and La. R.S. § 8:903.1).⁹⁴ These statutes are distinguished from La. R.S. § 8:308 in that, in order for a cemetery authority to do repairs or renovations to cemetery spaces, abandonment need not be established.⁹⁵ It is well accepted that many of the cemeteries in Louisiana are in a state of disrepair.⁹⁶ More commonly though, entire cemeteries are not derelict, but rather some of the cemetery spaces within the cemeteries are in bad shape.⁹⁷ It is understandable that cemetery operators would want to beautify their cemeteries through renovation projects on the run-down spaces within. However, this “beautification” can cause problems for accurate historic preservation of cemeteries.⁹⁸ Subject to limitations, such repair and renovation is permissible under La. R.S. § 8:903 and 8:903.1.

holding lands within this state for interment purposes. With the inclusion of the terms “operating,” “controlling,” and “managing,” and with the phrase “for interment purposes,” it is clear that the term “cemetery authority” refers only to cemeteries that are actively operating and not those that operated at one time and are now abandoned or otherwise closed.

Id.

94. LA. REV. STAT. ANN. §§ 8:903-8:903.1 (2009).

95. Compare LA. REV. STAT. ANN. § 8:903 and § 8:903.1 with § 8:308 (2009).

96. This reality has been documented by numerous authors and has been substantially exacerbated by the destruction wrought by Hurricanes Katrina and Rita. See, e.g., *Sisters of Destruction*, *supra* note 19.

97. See, e.g., Letter to Labbé, *supra* note 82.

98. See, e.g., David Foil, *Old Highland Cemetery Has New Look*, STATE TIMES (May 30, 1973), reprinted in EVELYN M. THOM, *HIGHLAND CEMETERY PRESERVED!* 78 (2005) (noting additions to early nineteenth century cemetery during beautification efforts that were not part of the cemetery’s original plan).

**c. Restoration of Specific Grave Spaces in Regulated Cemeteries III:
La. R.S. § 8:903**

La. R.S. § 8:903(A) clearly states that “[c]emetery authorities may renovate and repair *but not demolish* . . .” a derelict cemetery space.⁹⁹ Although La. R.S. § 8:903.1 is silent on the issue of demolition, it is likely that because that section refers to vaults and wall vaults—both types of cemetery spaces—that La. R.S. § 8:903.1 is subject to the more general rule forbidding the demolition of any cemetery space under La. R.S. § 8:903(A).¹⁰⁰

The foregoing analysis of demolition relates to the power of cemetery authorities, not to the actual descendants/owners of the spaces themselves.¹⁰¹ Although repair and renovation should be the favored approach to dealing with derelict cemetery spaces, the law does not prohibit descendants or space owners from demolishing a cemetery space, provided that the remains are properly cared for in accordance with Title 8.¹⁰² A cautionary note is warranted here. For older cemetery spaces, the descendants of those interred therein may be numerous;¹⁰³ demolition of a space by only some of an interred’s descendants may subject demolishers to

99. LA. REV. STAT. ANN. § 8:903(A) (2009) (emphasis added).

100. This opinion is supported by some old Louisiana jurisprudence, in which the courts seemed to recognize that cemetery spaces were not to be destroyed. *See, e.g.,* *Metairie Cemetery Ass’n v. Bd. of Assessors*, 37 La. Ann. 32 (1885).

101. For the purposes of this article, the terms “descendants,” “owners,” and “successors or heirs” refer to the same people: those with a legally-recognized ownership interest in a cemetery space. Moreover, the term “ownership interest” refers only to the actual right of interment in a cemetery space. This “ownership interest” has been recognized by the Louisiana courts as something less than a fee ownership, but more than a right of use. *See Humphreys v. Bennett Oil Corp.*, 197 So. 222, 228 (La. 1940) (“while plaintiffs do not own, in a strict legal sense, an interest in the cemetery, they do have a ‘species of interest or form of title’ therein.”).

102. This reality is supported by the Louisiana jurisprudence, which does appear to recognize that descendants retain rights to control the fate of their ancestors’ burial spaces. *See Leleux v. Viator*, 55 So. 2d 662, 666 (La. Ct. App. 1 Cir. 1951). This reality exists in contrast to the jurisprudential rule that, generally, descendants do not have control over the actual remains of their ancestors. *See Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936). The *Welch* opinion stands in seeming contrast to the holding in *Humphreys*, 197 So. at 228, which states that there is some property interest of descendants in the remains of their ancestors. *See Welch*, 82 F.2d at 799. However, it is apparent that this property interest relates to the ability of descendants to recover for damages when the graves of their ancestors have been disturbed and nothing more.

103. *See, e.g.,* JAN ARRIGO & LAURA A. MCELROY, *CEMETERIES OF NEW ORLEANS: A JOURNEY THROUGH THE CITIES OF THE DEAD* 12 (Ann Kahn, ed., Batture Press, 2005) (1997) (noting that, historically, as the remains of family members decayed and new space was needed for interments, the remains would be gathered and placed in a vault below the family tomb, thus leading to substantial numbers of individuals being interred in the same space (and presumably exponentially more descendants of these numerous individuals)).

liability from other descendants who did not want the space demolished.¹⁰⁴

As to the renovation or repair process, La. R.S. § 8:903 and 8:903.1 are somewhat vague. Both La. R.S. § 8:903 and 8:903.1 require actual notice or attempts to notify proper parties of a cemetery's intent to undertake work on a cemetery space. This notice must be in the form of publication in the local official journal and through the placement of notices on the cemetery spaces slated for repair or renovation.¹⁰⁵ Additionally, written notice of the intent to repair or renovate is required to be sent to the record owner via certified or registered mail.¹⁰⁶ After such notice is sent, the record owners have one year or less to make the necessary repairs.¹⁰⁷ Following the one year period, if no objection is received from the record owner, then, and only then, can the cemetery "proceed with the repairs or renovations."¹⁰⁸ Cemetery authorities must make diligent efforts to accomplish the notice requirements set forth in the law before undertaking any repairs or renovations to derelict cemetery spaces. Additionally, if at any point during the repairs or renovations the human remains within need to be moved, the next of kin¹⁰⁹ must be notified once again.¹¹⁰ If, after a diligent effort, the next of kin cannot be reached, the remains may be moved, but only through a court order issued from the jurisdiction within which the cemetery is located.¹¹¹

When the descendants cannot be located, the provisions of La. R.S. § 8:903 provide for reimbursement to the cemetery authority that spends money on the repair or renovation of a cemetery space.¹¹² However, the law says nothing about a gained ownership interest in the cemetery space

104. The jurisprudence is replete with examples of descendants' disagreements as to the disposition of remains and cemetery spaces. *See generally* In the Matter of Dufour, 622 So. 2d 1181 (La. Ct. App. 5 Cir. 1993); Spiess v. Greenwood Dev. Co., 542 So. 2d 810 (La. Ct. App. 3 Cir. 1989); Byrd v. Byrd, 488 So. 2d 1134 (La. Ct. App. 2 Cir. 1986). Thus, this cautionary note is not without support.

105. LA. REV. STAT. ANN. § 8:903(A), (A)(1) (2009).

106. *Id.* § 8:903.

107. *See id.* § 8:903(A) (discussing general cemetery spaces). *See* § 8:903.1(A)(2) (explaining that for wall vaults the delay period is only six months).

108. *Id.* § 8:903(A).

109. For the purposes of moving human remains, the proper "next of kin" to be contacted is laid out in title 8, section 659 of Louisiana's Revised Statutes. This is a particularly important step, as the Louisiana courts have recognized "a 'quasi-property' right of survivors in the remains of their deceased relatives." Arnaud v. Odom, 870 F.2d 304, 308 (5th Cir. 1989).

110. LA. REV. STAT. ANN. § 8:659 (2009).

111. *Id.* § 8:659(B).

112. *See* LA. REV. STAT. ANN. § 8:903 (2009).

by a cemetery that pays for repairs.¹¹³ Thus, cemeteries that fund repairs or renovations of derelict cemetery spaces probably do so at their own expense.

If such cemeteries want to gain an ownership interest in those spaces, different rules apply for private, for-profit cemeteries versus municipal, religious, and nonprofit cemeteries. Although the law is silent on the rules applicable to private, for-profit cemeteries, those cemeteries seem to be excluded from the shorter delays provided in La. R.S. § 8:903(C). There is a need for legislative clarity in this regard. In the absence of such clarification, it appears, sadly, that private, for-profit cemeteries can act with impunity when dealing with abandoned grave spaces.

As to municipal, religious, and nonprofit cemeteries, once repairs have been done, should the owners or their successors or heirs remain unaccounted for after three years' worth of diligent efforts, the cemetery authority may obtain ownership of that space.¹¹⁴ Furthermore, the resale of such spaces is subject to the procedures outlined in La. R.S. § 8:308. As noted above, "diligent efforts" likely include, but are not limited to, following the advertising procedures in La. R.S. § 8:308, La. R.S. § 8:903, and La. R.S. § 8:903.1 and notices near the spaces sought to be repaired or ownership reclaimed, as well as at cemetery entrances.

Yet another issue pertains to the potential situation in which a family does come forward after the intent-to-repair La. R.S. § 8:903 notice is given, but refuses to pay for the repairs. Such a scenario is not contemplated in the law. However, the cemetery may likely proceed with the repairs at its own expense if the family does not object.¹¹⁵ There is also no language in the law regarding whether a cemetery authority may repossess a space if the family fails to pay for the repairs upon actual notice being achieved within the three-year period¹¹⁶ following repairs.

113. It is important to note that the term "ownership" as it relates to grave spaces does not comport with the typical definition of that term. Grave spaces are owned, in the traditional sense, by the cemetery authority or landowner. What interest those interred therein or their descendants have is more of an inchoate right – a right of interment. They do not, unless provided by contract, hold an ownership interest in their grave spaces. *See generally* HUGH Y. BERNARD, *THE LAW OF DEATH AND DISPOSAL OF THE DEAD* (Irving J. Sloan, ed., Oceana Publ'ns, Inc., 2nd ed. 1979) (1966).

114. LA. REV. STAT. ANN. § 8:903(C) (2009).

115. This proposition derives from La. R.S. § 8:903(A), which states that "[u]pon failing to receive any objections, after due notice has been given, the cemetery authority may proceed with the repairs or renovations with impunity." LA. REV. STAT. ANN. § 8:903(A) (2009). Clearly, this gives a cemetery contemplating repairs the authority to proceed with those renovations in the absence of an objection, but it does not burden family with the costs of such work should they not want to undertake it. *See id.*

116. Which would actually be ten or twenty-five years (depending on the parish population) for

Apparently, because families may not be able to afford the repairs that a cemetery believes are warranted, and because of the sentimental attachment to cemetery spaces by descendants, the law does not contemplate repossession simply because a family may be too poor to pay for maintenance. That said, should a family want to use the cemetery space after the repairs have been made at the cemetery's expense, La. R.S. § 8:903 permits cemetery authorities to condition the use on paying the costs of the repairs.

The rules related to vaults¹¹⁷ and wall vaults¹¹⁸ under La. R.S. § 8:903.1 differ somewhat from those for other cemetery spaces under La. R.S. § 8:903. There is no explanation for this difference, but it is probable that the difference is due to the communal nature of vaults and wall vaults—these spaces are generally part of a larger structure at a cemetery, whose deterioration in one space could affect others' spaces. With respect to these spaces, the law provides cemeteries the right to immediately undertake repairs or renovations for which the cemetery has no evidence of ownership.¹¹⁹ Once the repairs have been completed, the cemetery must place notice in the local official journal requesting people with evidence of ownership to come forward within sixty days to prove such ownership.¹²⁰ Following the lapse of the sixty-day period, the cemetery authority may reclaim ownership of these spaces and may resell them subject to the procedural requirements of La. R.S. § 8:903.1. La. R.S. § 8:903.1(A)(3) also provides that, should the cemetery records indicate ownership of a vault or wall vault in need of repair, notice must be sent to the owners and published in the parish's official journal giving the owners six months to come forward to prove ownership before the cemetery reclaims ownership of the space. Like La. R.S. § 8:903, La. R.S. § 8:903.1(A)(4) similarly requires posting notices in conspicuous places within the cemetery itself.

Unlike the requirement of La. R.S. § 8:903, La. R.S. § 8:903.1 does not require notification to the next of kin prior to moving remains for the planned repairs; remains can be temporarily moved for the purpose of

private, for-profit cemeteries. LA. REV. STAT. ANN. § 8:308 (2009).

117. "Vault" is defined in La. R.S. § 8:1(19) as "a space in a mausoleum of sufficient size, used or intended to be used, to entomb human remains." LA. REV. STAT. ANN. § 8:1(19) (Supp. 2009).

118. "Wall vault" is not statutorily defined in Louisiana.

119. It is important to note that such unilateral repair activity is only permitted for vaults or wall vaults that are more than fifty years old or vaults or wall vaults that are in cemeteries that are more than one hundred years old. No such authority exists in the law for spaces younger than those noted in La. R.S. § 8:903.1 and it is probable that unilateral repairs in those instances are not permissible. A likely exception to this restriction is a situation in which repairs must be undertaken to protect the public's safety and health.

120. LA. REV. STAT. ANN. § 8:903(A)(1) (2009).

effectuating repairs to a vault or wall vault.¹²¹ Another difference between La. R.S. § 8:903 and La. R.S. § 8:903.1 is that if an owner comes forward within the prescribed notice period before a reclamation of ownership, the cemetery authority can require payment of that person's pro rata share of the repair costs. Should they refuse to pay these costs, ownership reverts to the cemetery authority.¹²² None of the provisions of La. R.S. § 8:903.1 are applicable to those cemetery spaces placed in perpetual care.¹²³

d. What can Cemetery Authorities do to Grave Spaces Under Title 8? The Meaning of “Repair,” “Renovate,” and “Maintain”

The above review makes clear that, following the passage of a prescribed amount of time and having made the proper notifications, a cemetery authority may unilaterally undertake certain activities to alter grave spaces. Title 8 contains certain undefined terms that purport to instruct these authorities on what they can and cannot do to such spaces. As noted above, these terms are “repair,” “renovate,” and “maintain.” It is unclear how these terms fit into the grander scheme of historic cemetery preservation. Thus, the following review is necessary.

Because the terms “repair,” “renovate,” and “maintain” are not defined in Title 8, they must be given their usual, common sense definitions.¹²⁴ The Oxford English Dictionary¹²⁵ provides the following definitions for the word “repair”:

To restore (a composite thing, structure, etc.) to good condition by renewal or replacement of decayed or damaged parts, or by refixing what has given way; to mend.

To renew, renovate (some thing or part); to restore to a fresh or sound condition by making up in some way for previous loss, waste, decay, or exhaustion.¹²⁶

The Oxford English Dictionary provides the following definition for the word “renovate”:

121. *Id.* § 8:903.1(A)(2).

122. *Id.* § 8:903.1(A)(1).

123. LA. REV. STAT. ANN. § 8:903.1 (B) (2009).

124. LA. CIV. CODE ANN. art. 11 (2009).

125. The Oxford English Dictionary is used herein because it is well-recognized as the most comprehensive compendium of English language usage, with coverage of all dialects of English, including American English. See generally SIMON WINCHESTER, THE MEANING OF EVERYTHING: THE STORY OF THE OXFORD ENGLISH DICTIONARY (Oxford Univ. Press 2003).

126. XIII OXFORD ENGLISH DICTIONARY 627-28 (2d ed. 1989) [hereinafter OXFORD ENGLISH DICTIONARY, Vol. ____, at ____].

To renew materially; to repair; to restore by replacing lost or damaged parts; to create anew.¹²⁷

The Oxford English Dictionary provides the following definition for the word “maintain”:

To keep up, preserve, cause to continue in being (a state of things, a condition, an activity, etc.); to keep vigorous, effective, or unimpaired; to guard from loss or deterioration.¹²⁸

Although each of these definitions varies in some way, the clear theme running through all of them is that the actions contemplated by those words are intended to support the preservation of something. These definitions stand in stark contrast to the definition for “demolish,” which is defined by the Oxford English Dictionary thus:

To destroy (a building or other structure) by violent disintegration of its fabric; to pull or throw down, pull to pieces, reduce to ruin.¹²⁹

The definition of “demolish” clearly indicates that the actions contemplated by that word are not preservative in nature, but are destructive. Thus, through the use of terms such as “repair,” “renovate,” and “maintain,” cemetery authorities may require the removal and replacement of certain components of a cemetery space to ensure its continued existence. As these terms connote preservation, the term “demolition” is mutually excluded; the law does not contemplate the demolition of cemetery spaces in order to achieve the goal of cemetery beautification. Unfortunately, the law of Louisiana also does not mandate that the repairs, renovations, and maintenance be done in a historically accurate manner. This unfortunate oversight may lead to—and in some cases clearly has led to—renovations that are aesthetically pleasing but historically inaccurate.¹³⁰ In such cases, information regarding past cultures and ways of life is lost. There is a relatively easy way to fix this oversight: require renovations to be done according to historic preservationists’ oversight. This possibility will be explored in a later section.

3. UNMARKED BURIALS ACT

As noted above, the LCB is charged with the duty to “enforce and

127. *Id.* at Vol. XIII, at 617-18.

128. OXFORD ENGLISH DICTIONARY, *supra* note 126 at Vol. IX, at 223.

129. *Id.* at Vol. IV, at 444.

130. See generally THOM, *supra* note 98; JASON EVANGELISTA, LIVING WITH THE DEAD: REDESIGN OF THE HIGHLAND CEMETERY (2001) (proposing substantial changes to a historic cemetery to make it more aesthetically pleasing, but with little or no consideration for its historic integrity).

administer the provisions of”¹³¹ Title 8 and is empowered to create rules and regulations to effectuate that enforcement and administration.¹³² Although the LCB’s authority to enforce the law of Title 8 is clear and unambiguous, the Legislature has provided a series of cemeteries that are exempted from some of the LCB’s regulatory requirements. These exempted cemeteries are:

family burial grounds,¹³³ fraternal cemeteries,¹³⁴ municipal cemeteries,¹³⁵ community cemeteries,¹³⁶ state cemeteries,¹³⁷ federal cemeteries¹³⁸ or religious cemeteries¹³⁹ *that do not sell cemetery spaces, sell the right of use or interment in any cemetery space, or charge a fee per cemetery space for an amount in excess of three hundred dollars.*¹⁴⁰

Thus, as long as the above-enumerated types of cemeteries do not sell

131. LA. REV. STAT. ANN. § 8:66 (2009). This enforcement and administration authority is only limited by Chapter 10-A of Title 8, which is known as the Louisiana Unmarked Human Burial Sites Preservation Act (the Unmarked Burials Act). See LA. REV. STAT. ANN. §§ 8:671-681 (2009). The provisions of this Chapter are enforced (now) by the Louisiana Division of Archaeology and the Louisiana Attorney General.

132. LA. REV. STAT. ANN. § 8:67 (2009). It is also important to note that the enforcement authority of the LCB extends to typical administrative enforcement. Beyond that authority, the Louisiana Attorney General is empowered to assist the LCB in the enforcement of Title 8.

133. “‘Family burial ground’ means a cemetery in which no lots are sold to the public and in which interments are restricted to a group of persons related to each other by blood or marriage.” LA. REV. STAT. ANN. § 8:1(22) (2009).

134. “‘Fraternal cemetery’ means a cemetery owned, operated, controlled or managed by any fraternal organization or auxiliary organization thereof, in which the sale of lots, graves, crypts, vaults or niches is restricted principally to its members.” *Id.* § 8:1(23).

135. “‘Municipal cemetery’ means a cemetery owned, operated, controlled or managed by a municipality or other political subdivision of the state, or instrumentality thereof authorized by law to own, operate or manage a cemetery.” *Id.* § 8:1(31).

136. “‘Community cemetery’ means a cemetery owned, operated, controlled or managed by any association or organization, in which the sale of lots, graves, crypts, vaults, or niches is restricted principally to individuals within a community.” *Id.* § 8:1(14).

137. “State cemetery” is not defined in Title 8, but the plain language of that term suggests that it refers to cemeteries owned and operated by the State of Louisiana.

138. “Federal cemetery” is not defined in Title 8, but the plain language of that term suggests that it refers to cemeteries owned and operated by the United States government.

139. “‘Religious cemetery’ means a cemetery that is owned, operated, controlled or managed by a recognized church, religious society, association or denomination, or by a cemetery authority or a corporation administering or through which is administered the temporalities of any recognized church, religious society, association or denomination.” LA. REV. STAT. ANN. § 8:1(37) (2009).

140. *Id.* § 8:78 (2009) (emphasis added). It is important to note that these exemptions are extremely limited in scope. They only exempt such cemeteries from the necessity to obtain and maintain a certificate of authority from the LCB. They do not exempt such cemeteries from compliance with the remainder of Title 8.

cemetery spaces or interment rights for more than three hundred dollars, those cemeteries are exempt from Title 8's regulatory requirements of obtaining a certificate of authority from the LCB. However, this does not exempt these cemeteries from the duty to comply with Title 8's general provisions, nor does it limit the LCB's authority to enforce these provisions against such cemeteries. In addition, for some time the LCB has made a practice of keeping a register of as many of these exempt cemeteries as possible, in the interest of maintaining contact information and for monitoring compliance with the three hundred dollar threshold.¹⁴¹ Such record keeping is a prudent practice and is in keeping with the LCB's charge to enforce and administer Title 8.

As noted, these exempted cemeteries are most often the ones in which problems arise related to threats to historic integrity and the sanctity of the burials. Such problems manifest themselves both through well-intentioned but inappropriately executed preservation and conservation efforts, as well as through development activities.¹⁴² However, the limits of the LCB's regulatory jurisdiction extend to enforcing the provisions of Title 8 to the operating cemeteries in Louisiana. This jurisdiction also covers restrictions against demolition of cemetery spaces within operating cemeteries.¹⁴³

What then, if any, is the regulatory authority applicable to exempt and abandoned cemeteries? One way of looking at how Louisiana law applies protection to exempt and abandoned cemeteries is by strictly contrasting the literal definitions of "marked" and "unmarked" burials. Unmarked burials are clearly covered under the Unmarked Burials Act.¹⁴⁴ However, there is no definition for the term "marked" in the law. Indeed, even the term "unmarked" is subject to interpretation.

One interpretation is simply that "unmarked" refers only to those graves that have no traditional grave markers at all (i.e., contrasted with the "marking" of graves that comes with having a grave marker—in other words, "marked" graves). Although we do not believe that this is a proper interpretation of that term, a brief discussion of the ramifications of that interpretation is incorporated here.

Under what we believe is an incorrect interpretation of the intent of the law of cemeteries in Louisiana, the statutes would divide the coverage of the law between the defined "unmarked" graves and the undefined

141. E-mail from Lucy L. McCann, Director, Louisiana Cemetery Board, to Ryan M. Seidemann, Assistant Attorney General (Feb. 9, 2009, 09:52 CST) (on file with authors).

142. See generally TOMB IT MAY CONCERN, *supra* note 10.

143. LA. REV. STAT. ANN. §§ 8:308, 8:903-903.1 (2009).

144. See *id.* §§ 8:671-681.

“marked” graves. Under this scenario, the Unmarked Burials Act would not apply to “marked” cemeteries. Many of these cemeteries will be classified exempt under Title 8. Those entities must comply with La. R.S. § 8:308, La. R.S. § 8:903 and 8:903.1, regardless of their exempt status. The LCB, being charged with the enforcement of Title 8 generally, can advise exempt, operating cemeteries and can request the assistance of the attorney general¹⁴⁵ for the enforcement of these provisions limiting reconstruction and repair of cemetery spaces and restricting their destruction in all active Louisiana cemeteries.¹⁴⁶

Under this scenario, there appears to be no legal protection for burials with traditional markers not falling under the “exempt” classification. In other words, abandoned cemeteries that have “marked” graves could arguably be plowed under with relative impunity (subject to the desecration restrictions of Title 14) if they do not classify as “exempt” or “nonexempt” cemeteries under Title 8. We believe that such an interpretation is based upon arbitrary principles and would lead to absurd consequences in contravention of La. C.C. Art. 9. As the Legislature cannot be presumed to act in such an absurd manner as to leave such a gap in the law,¹⁴⁷ we believe that the proper way to look at the legal protections for such cemeteries is through a careful but thorough interpretation of the Unmarked Burials Act.

Abandoned cemeteries otherwise exempt from the purview of Title 8 are not covered by the regulatory authority of the LCB, but rather are under the authority of the Louisiana Division of Archaeology (the Division) by virtue of Chapter 10A of Title 8. As created by Act 704 of 1991, the Louisiana Unmarked Human Burial Sites Preservation Act¹⁴⁸ (the Unmarked Burials Act) was placed under the Louisiana Unmarked Burial Sites Board’s enforcement authority.¹⁴⁹ However, by Act 791 of 2006, the Louisiana Legislature abolished this Board and rolled its duties into the Louisiana Department of Culture, Recreation, and Tourism,¹⁵⁰ with the Board’s permitting duties now the responsibility of the Louisiana Division

145. The attorney general’s role in these matters arises by virtue of his being the statutory attorney for the Louisiana Cemetery Board, as well as his position as the chief legal officer for the State. LA. REV. STAT. ANN. § 8:69 (2009); LA. CONST. art. IV, § 8.

146. LA. REV. STAT. ANN. § 8:66 (2009).

147. *Johnston v. Morehouse Parish Police Jury*, 424 So. 2d 1053, 1056 (La. Ct. App. 2 Cir. 1982) (“As a general rule, the legislature does not enact vain and useless legislation.”).

148. The Unmarked Burials Act is codified at title 8, sections 671-681 of the Louisiana Revised Statutes. See LA. REV. STAT. ANN. §§ 8:671-681 (2009).

149. *Id.* § 8:675.

150. This reorganization is now codified at title 36, section 209(H)(3) of the Louisiana Revised Statutes. See LA. REV. STAT. ANN. § 36:209(H)(3) (2009), *repealed*, H.B. 852, 2009 Leg., Reg. Sess. (La. 2009).

of Archaeology¹⁵¹ and the State Archaeologist.

The question as to what regulatory authority has jurisdiction over abandoned cemeteries is grounded in the language of the Unmarked Burials Act. That Act specifically defines “unmarked burial site” as:

the immediate area where one or more human skeletal remains are found in the ground that is not in a recognized and maintained municipal, fraternal, religious, or family cemetery, or a cemetery authorized by the Louisiana Cemetery Board.¹⁵²

This definition is informative. First, it clearly exempts from the regulatory authority of the Division, and the purview of the Unmarked Burials Act, any “cemetery authorized by the” LCB. Accordingly, if a cemetery holds a current certificate of authority issued by the LCB pursuant to La. R.S. §§ 8:70-72, the Division has no jurisdiction over that cemetery, and the Unmarked Burials Act does not apply.

Second, the definition in La. R.S. § 8:673(5) also clearly exempts those cemeteries classified as being “recognized and maintained municipal, fraternal, religious, or family cemetery.”¹⁵³ There is no definition in Title 8 for either the words “recognized” or “maintained.” However, within the broader context of Title 8, it is apparent that “recognition” refers to the presence of a cemetery on the LCB’s register of those cemeteries that are operating but not meeting the three hundred dollar licensing threshold.¹⁵⁴ It is also important to note that the two important words in this phrase of La. R.S. § 8:673(5) are disjunctive. Thus, the simple fact that a cemetery is registered with the LCB does not exempt that cemetery from coverage by the Unmarked Burials Act. Only cemeteries that do not hold a current LCB certificate of authority, but that are recognized by the LCB *and* are maintained can claim an exemption from the Unmarked Burials Act.

As with the term “recognition,” there is no definition of the term “maintained” in Title 8. Following the requirement of La. C.C. Art. 11, which states that “[t]he words of a law must be given their generally prevailing meaning,” a dictionary definition of the term “maintain” must be employed to divine the Legislature’s intended application of the Unmarked

151. The Division of Archaeology was established in title 41, sections 1601-1615 of the Louisiana Revised Statutes. *See* LA. REV. STAT. ANN. §§ 41:1601-15 (2009). The Division of Archaeology is under the authority of the Department of Culture, Recreation, and Tourism. LA. REV. STAT. ANN. § 36:209(E) (2009).

152. LA. REV. STAT. ANN. § 8:673(5) (2009).

153. *Id.*

154. Another source for the “recognition” requirement may be the Louisiana Historic Cemetery Register. *See* LA. REV. STAT. ANN. § 25:914 (2009).

Burials Act. The Concise Oxford English Dictionary defines “maintain” as to “keep (a building, machine, etc.) in good condition by checking or repairing it regularly.”¹⁵⁵ Thus, an unmaintained cemetery would be the equivalent of what would colloquially be referred to as an abandoned cemetery.¹⁵⁶

From the previous analysis, the question arises: does the term “unmarked” in the Unmarked Burials Act refer to an actual burial that does not have a grave marker? Or, does it refer generally to the traditional nature of how the cemetery is “marked” (i.e., enclosed by a fence, etc.)? In other words, does the Division’s regulatory authority only cover graves without markers, but not graves with markers, or does it cover a broader range of abandoned cemeteries? A close examination of the Unmarked Burials Act suggests that the Division’s authority extends to the latter. This conclusion is supported by two factors: one, the environment within which the Unmarked Burials Act was created in the early 1990s and, two, the stated legislative intent of the Act.

The Unmarked Burials Act was enacted in the wake of Congress’s enactment of the NAGPRA¹⁵⁷ in 1990. As noted above, this piece of legislation set a mechanism in place for the return and reburial of certain Native American skeletal remains and sacred objects from museum and university collections across the United States, as well as providing for the protection of *in situ* remains.¹⁵⁸ NAGPRA’s legislative history makes abundantly evident the reality that Congress enacted this law because of its desire to make reparations for the wrongs committed against Native

155. CATHERINE SOANES & ANGUS STEVENSON, CONCISE OXFORD ENGLISH DICTIONARY 860 (2006).

156. This is consistent with the definition of the term “abandon”, which is to “give up (an action or practice) completely.” *Id.* at 2. A cemetery in which the caretakers have given up on keeping it in good condition would be an abandoned cemetery. This consistency is supported by the use of the term “abandoned cemetery” in Title 8. *See, e.g.*, LA. REV. STAT. ANN. § 8:308 (2009). Although Title 8 does not contain a definition for “abandoned cemetery,” the term’s use in sections 8:112, 8:308, and 8:903 of the Louisiana Revised Statutes is consistent with the use of the term herein. *See id.* §§ 8:112, 8:308, and 8:903 (2009). Indeed, the Louisiana Supreme Court has articulated one query into the question of abandonment as follows:

The cemetery in this case has clearly been abandoned. This burial ground has received no interment since 1872 and in its condition of disintegration is presently unfit for this purpose. In addition, the public and the survivors or others interested in its use as a cemetery have failed to keep and preserve it as a resting place for the dead. The premises have been permitted to fall into disorder, the walls to crumble, and the gravestones and monuments to be destroyed so that graves have lost their identity and nothing now remains to stir the emotions or sentiments of the relatives of the dead.

Touro Synagogue v. Goodwill Indus. of New Orleans Area, Inc., 96 So. 2d 29, 37-38 (La. 1957).

157. 25 U.S.C. §§ 3001-3013 (2006).

158. *See generally* McManamon, *supra* note 35.

Americans since 1492.¹⁵⁹ In recognition of NAGPRA's somewhat narrow scope,¹⁶⁰ many states nationwide set out to fill in the gaps left by Congress in the years after 1990.¹⁶¹ Louisiana's enactment of the Unmarked Burials Act in 1991 was part of this state-level movement. Because many of the states, including Louisiana, enacted burial protection laws that were much more comprehensive and preservation-oriented than NAGPRA, these laws should likely be broadly construed when considering which burials are covered.

The stated legislative purpose in La. R.S. § 8:672 clearly makes this Act one of broad application. That purpose states:

The legislature finds that existing state laws do not provide for the adequate protection of unmarked burial sites and of human skeletal remains and burial artifacts in such sites. As a result, there is a real and growing threat to the safety and sanctity of unmarked burial sites, both from economic development of the land and from persons engaged for personal or financial gain in the mining of prehistoric and historic Indian, pioneer, and Civil War and other soldiers' burial sites. Therefore, there is an immediate need for legislation to protect the burial sites of these earlier residents of Louisiana from desecration and to enable the proper archaeological investigation and study when disturbance of a burial site is necessary or desirable. The legislature intends that this Chapter shall assure that all human burial sites shall be accorded equal treatment, protection, and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations.¹⁶²

This legislative purpose is informative in that it recognizes the significant threats to cemeteries and extends its coverage equally, regardless

159. As noted in the legislative history of NAGPRA:

It is the view of this Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion.

S. REP. NO. 100-601, at 2 (1988). See also Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545 (2004) [hereinafter *Bones of Contention*].

160. It only applies to Native American remains and graves on federal or tribal land, or when federal funds are involved in a project. See 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 (2003).

161. See CHRISTINE QUIGLEY, *SKULLS AND SKELETONS: HUMAN BONE COLLECTIONS AND ACCUMULATIONS* 215-17 (2008).

162. LA. REV. STAT. ANN. § 8:672 (2009).

of the ethnic or cultural affiliation of the burials and regardless of the age of the burials. Equally important is the fact that the Legislature distinguished three classes of things in need of protection: human remains, burial artifacts, and burial sites.¹⁶³ From the recognition that burial sites are in need of protection, the purpose of the Unmarked Burials Act appears to provide the Division with the authority to permit activities occurring within any cemetery in Louisiana that meets the following classifications: (1) it is not a cemetery with a valid certificate of authority from the LCB; (2) it is not a cemetery registered with the LCB; and (3) it is not a maintained cemetery.

Thus, the Division's authority to regulate activities in abandoned cemeteries under the Unmarked Burials Act is clearly broad and does not rest on whether the actual grave in question is associated with a physical marker. Further, the LCB has no regulatory jurisdiction over cemeteries that fall within the coverage of the Unmarked Burials Act.

This interpretation of the Unmarked Burials Act's coverage is consistent with the realities of many isolated and abandoned cemeteries. In the case of abandoned and isolated cemeteries, it is highly unlikely that the graves with markers are the only graves on site. This is a common problem, as many markers were historically made of perishable materials that may have succumbed to the ravages of time.¹⁶⁴ Additionally, even stone or cement markers, if not properly set, may have sunken into the ground and are no longer visible.¹⁶⁵ Thus, there would be an absolute requirement to follow the Unmarked Burials Act procedures with respect to

163. *Id.*

164. *See, e.g., Thomas v. Mobley*, 118 So. 2d 476, 476 (La. Ct. App. 1 Cir. 1960). *See also* Gregory Jeane, *Rural Southern Graveyards: Sacred Artifacts in the Upland South Folk Cemetery*, in IV MARKERS 55, 57 (David Watters ed., 1987). In addition to problems of deteriorated and sunken grave markers, especially in the American South, Jeane notes that, historically, "gravestones were not especially common." *Id.*

165. *See, e.g.,* BRYAN S. HALEY, *GEOPHYSICAL SURVEY OF HIGHLAND CEMETERY, BATON ROUGE, LOUISIANA* (2003) (documenting numerous unmarked graves in a historic cemetery). Indeed, Kehoe-Forutan, *et al.* have documented a historic cemetery in Pennsylvania for which there are currently 266 visible markers, but for which estimates of actual space available for burials range as high as 1080. *See generally* Sandra J. Kehoe-Forutan *et al.*, *Penetrating the Mystery Beneath Millville Friends Meeting Cemetery*, 28 AGS Q. 11 (2004). A ground-penetrating radar confirmed that there were enough unmarked burials that the 1080 burial capacity cemetery was full and should not be reopened for new burials. *Id.* *See also* Shannon Seckinger, *Picking Up the Pieces: The Osborn Family Cemetery, Brielle, NJ*, AM. CEM. 22 (Apr. 2006) (discussing ground penetrating radar results); Garry O'Hara, *The Case of the Buried Tombstones: A Story of Gravestone Recovery and Restoration in Colorado*, 32 AGS Q. 7 (2008); Anon., *Human Skulls, Coffins Found at Apartment Construction Site*, AM. CEM. 4 (June 2009) (discussing briefly a cemetery disturbance at a construction site in Miami because there was no surface evidence of the cemetery's existence).

the unmarked graves. The Legislature probably did not intend for two separate sets of law to apply to the same piece of property.¹⁶⁶ Accordingly, it is more likely that the Unmarked Burials Act was intended to be applied as supplemental protection to the marked and unmarked graves in isolated and abandoned cemeteries.

Because the Division is vested with the authority to regulate any activities in abandoned cemeteries, it seems unlikely that the Legislature intended that the requirements to seek familial or judicial approval for disinterment under La. R.S. § 8:659 should apply to abandoned cemeteries. These requirements are embodied in the Division's charges under the Unmarked Burials Act, to wit:

The [Division] shall have the following powers and duties:

(3) To consult with all interested parties on occasions of disturbance of unmarked burial sites to determine a proper course of action.

(6) To issue permits for the disinterment and/or for the scientific study of human skeletal remains . . .¹⁶⁷

Because these provisions embody the spirit of the requirements of La. R.S. § 8:659, requiring compliance with both provisions would be duplicative and unnecessary.¹⁶⁸

One provision of Title 8 that cannot be avoided through the application of the Unmarked Burials Act to a cemetery is the dedication of property under La. R.S. § 8:304. That provision states:

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 Title.¹⁶⁹

Basically, what La. R.S. § 8:304(A) means is that, once a piece of property is used as a cemetery, the property becomes dedicated to that

166. *Johnston v. Morehouse Parish Police Jury*, 424 So. 2d 1053, 1056 (La. Ct. App. 2 Cir. 1982) (“As a general rule, the legislature does not enact vain and useless legislation.”).

167. LA. REV. STAT. ANN. § 8:676 (2009).

168. *See* *La. Cablevision v. La. Pub. Serv. Comm’n*, 493 So. 2d 555, 558 (La. 1986) (recognizing, in dicta, the time- and resource-wasting nature of applying duplicative laws).

169. LA. REV. STAT. ANN. § 8:304(A) (2009).

purpose.¹⁷⁰ Thus, a cemetery does not depend on any specialized markings or border, nor is there any need for a recordation of the cemetery to be effectuated in public records.¹⁷¹ The mere removal of obvious graves from a property does not accomplish a removal of the dedication.¹⁷² Part of the reason that a dedication is not *de facto* removed by the removal of obvious graves is the reality that, although obvious graves may be removed, other remains may continue to be interred at a site,¹⁷³ thus necessitating continued protection. The other component to this requirement is legal. La. R.S. § 8:306—the provision of the law that provides for the removal of the dedication—requires that all remains be removed from the area that is to be undedicated.¹⁷⁴

Pursuant to its statutory authority to permit activities in abandoned cemeteries, the Division must include requirements for the compliance with La. R.S. §§ 8:304 and 8:306 in its permits. It seems perfectly acceptable for the Division to require the use of remote sensing technology, ground scraping, or any other methodology that it deems appropriate as part of a permit to ensure that all burials have been removed from an area. Following such assurances, the party seeking a removal of the cemetery dedication must seek a court order removing that dedication following the procedures outlined in La. R.S. § 8:306.

When considering the Unmarked Burials Act, it is prudent to consider

170. See generally *Humphreys v. Bennett Oil Corp.*, 197 So. 2d 222 (La. 1940); *Locke v. Lester*, 78 So. 2d 14 (La. Ct. App. 2 Cir. 1955). See also *Thomas v. Mobley*, 118 So. 2d 476, 478 (La. Ct. App. 1 Cir. 1960). It is important to note that the dedication of property as a cemetery need not be a formal or recorded dedication. *Humphreys*, 197 So. 2d at 225-27. Indeed, the mere use of a piece of property as a burial place is enough to effectuate the dedication. *Id.* Although the *Humphreys* court seemed to suggest that an abandonment of the cemetery may also effectuate a removal of the dedication, such is not the case. See *id.* at 227. The *Humphreys* supposition is based, as is the one in *Thomas*, 118 So. 2d at 478, on the premise that if a cemetery is abandoned-in-fact and the descendants have died off or moved away, that the cemetery “may lose [its] sacred and protected character.” *Thomas*, 118 So. 2d at 478. However, this supposition stands in stark contrast to the more recent action of the Louisiana Legislature and the U.S. Congress, both of which have affirmed the perpetual sacred and protected nature of cemeteries with the Unmarked Burials Act and NAGPRA, respectively. See 25 U.S.C. §§ 3001-13 (2006); LA. REV. STAT. ANN. §§ 8:671-81 (2009). Thus, this supposition is, at the least, outmoded, and at most, legislatively overruled.

171. See generally *Humphreys v. Bennett Oil Corp.*, 197 So. 2d 222 (La. 1940); *Thomas v. Mobley*, 118 So. 2d 476 (La. Ct. App. 1 Cir. 1960).

172. It is also important to note that Louisiana courts have held that the dedication of property as a cemetery is not subject to prescription. *Lester v. Locke*, 78 So. 2d 14, 16 (La. Ct. App. 2 Cir. 1955).

173. See generally *HALEY*, *supra* note 165; *Jeane*, *supra* note 165.

174. See LA. REV. STAT. ANN. § 8:316 (2009). Section 8:316 provides for the procedure for disturbing cemeteries for non-cemetery purposes both when a cemetery authority exists and when one does not. *Id.*

the interplay of the LCB's regulatory authority under Title 8 and the Division's regulatory authority for potential conflicts. As noted above, the LCB has no regulatory authority over cemeteries considered abandoned and with the coverage of the Unmarked Burials Act. That said, LCB-regulated cemeteries must comply with some historic preservation requirements when undertaking certain activities.¹⁷⁵ Thus, for those cemeteries holding current certificates of authority from the LCB or those meeting the requirements of La. R.S. 8:673(5) (i.e., cemeteries that do not fall under the coverage of the Unmarked Burials Act), compliance with La. R.S. §§ 8:308, 8:903, and 8:903.1 is mandatory. All other cemeteries are subject to the regulatory and permitting authority of the Division under the Unmarked Burials Act. Accordingly, there does not appear to be any overlapping authority between the LCB and the Division.

4. PROTECTION OF CEMETERIES ON STATE LAND

If the land containing a burial, marked or unmarked, is categorized as state property, then the burial falls under the authority of the Louisiana State Land Office (SLO).¹⁷⁶ The SLO is "responsible for the identification, management, and regulation of state public lands and waterbottoms."¹⁷⁷ Some of the authority of the SLO is deferred to the Department of Culture, Recreation, and Tourism (CRT), which in turn administers and protects historic or prehistoric resources, including cemeteries, on state owned property.¹⁷⁸

In addition to its duties under the Unmarked Burials Act, the Division is charged with protecting archaeological sites, including cemeteries, located on state land.¹⁷⁹ The Division is also responsible for initiating and promulgating a program in archaeology, which establishes reasonable rules and regulations for dealing with the recovery and study of historic and prehistoric archaeological remains located on or in the state of Louisiana that relate to the state's heritage or livelihood.¹⁸⁰

The Division also serves as an advisory source for all state agencies, evaluating the impact of their projects on these sites.¹⁸¹ According to Title

175. See LA. REV. STAT. ANN. §§ 8:308, 8:903-903.1 (2009).

176. This is simply a recognition of the reality that the SLO functions as the manager of lands owned by the State, thus meaning that it has some management authority over such burials. Louisiana State Land Office, <http://doa.louisiana.gov/slo/default.htm> (last visited Jan. 17, 2009).

177. *Id.*

178. LA. REV. STAT. ANN. § 41:1605 (2009).

179. *Id.* §§ 41:1603-04.

180. *Id.* § 41:1604.

181. *Id.*

41, it is illegal for any person, agency, or political subdivision to excavate or in any way alter state lands without first obtaining a permit or contract from the Division.¹⁸²

5. THE PROTECTION OF CEMETERIES ON PRIVATE LANDS

One division of CRT that regulates the protection and management of significant historic sites is the Division of Historic Preservation (DHP).¹⁸³ One function of the DHP is to administer the state's responsibilities with respect to the National Register of Historic Places (National Register), which was established by Congress in 1966 as part of the NHPA.¹⁸⁴ The DHP is responsible for nominating buildings, sites, districts, and other potentially significant properties to the National Register.¹⁸⁵ The DHP can grant tax incentives to Louisiana citizens with property on the list that continue to restore and preserve the site.¹⁸⁶ As has been noted in other studies, tax incentives may represent significant reasons for the preservation of private property.¹⁸⁷

Cemeteries on private land receive the least protection; such cemeteries are left to the regulation of the LCB and the Division in only a limited capacity. With regard to cemeteries on private lands classified as unmarked, the Division has regulatory authority by virtue of the Unmarked Burials Act.¹⁸⁸ Other cemeteries either fall under the LCB's regulatory authority or the provisions of La. R.S. §§ 8:308, 8:903, or 8:903.1.

6. CRIMINAL SANCTIONS AS PROTECTIONS FOR CEMETERIES

In addition to the protections for cemeteries present in Titles 8 and 41, Title 14, the Criminal Code, makes desecration of graves a crime in Louisiana.¹⁸⁹ The crime of grave desecration, a misdemeanor, bars disturbance or displacement of both human remains and grave markers/grave goods.¹⁹⁰ Although this law was probably not enacted to

182. LA. REV. STAT. ANN. § 41:1605 (2009).

183. *Id.* §§ 25:911-14.

184. LA. REV. STAT. ANN. § 25:912 (2009).

185. *Id.* § 25:912(1).

186. *Id.* § 25:912. These tax incentive programs can be found at 26 U.S.C. § 47 (2006) and LA. REV. STAT. ANN. §§ 47:4311-14 (2009).

187. *See, e.g.*, John H. Davidson, *The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands*, 39 *Envtl. L. Rep. News & Analysis* 10368 (2009); Ryan M. Seidemann & Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 *J. ENVTL. L. & LITIG.* 441, 441 (2002).

188. LA. REV. STAT. ANN. § 41:1604 (2009).

189. *Id.* § 14:101.

190. The Louisiana courts have held that temporary movements of markers for cemetery maintenance does not represent desecration. *See generally* *Thomas v. Mobley*, 118 So. 2d 476

promote historic preservation, at least in effect it prevents outright cemetery destruction.¹⁹¹ Nothing in this law restricts non-historically accurate work being done in cemeteries, but it does provide for criminal sanctions against those who would, with wanton disregard, plow through cemeteries for construction or looting purposes.¹⁹² Importantly, La. R.S. §14:101 does not restrict lawful disinterment.¹⁹³ Thus, it appears that, as long as the Title 8 procedures outlined above for moving remains or reclaiming a grave space are followed, La. R.S. § 14:101 is inapplicable to disinterment and alterations within cemeteries.

7. ACCESS RIGHTS FOR CONSERVATION PURPOSES

As families move and die off, property changes hands. This process is unfortunate in cemetery preservation terms because in Louisiana, as in many other parts of the country, the historic mainstay of burial was to do so on your own land or in small churchyards.¹⁹⁴ As property is parceled out and changes hands, cemeteries of long-gone relatives—some of significant historic, architectural, or cultural importance—become isolated from the living relatives of those interred therein.¹⁹⁵ Thankfully for both those relatives interested in visiting these cemeteries and for preservationists, Louisiana law provides a unique right of access across the land of others for cemetery visitation and maintenance. Cemeteries, being a particular type of property, are accessible to the descendants and friends of those buried therein, regardless of the current ownership of the surrounding and underlying property.

Louisiana jurisprudence clearly permits access to isolated

(La. Ct. App. 1 Cir. 1960) (finding that the removal of headstones to clean the graveyard did not constitute desecration of burial grounds).

191. Although there are no reported cases directly on the application of title 14, section 101 of Louisiana's Revised Statutes, this concept is supported by the reverence granted to burials in *Travelers Ins. Co. v. Welsh*, 82 F.2d 799 (5th Cir. 1936). The nature of section 101 as being directed at preventing criminal activity is highlighted by the following quote on the predecessor to section 101: "It is aimed exclusively at the misdeeds of vandals and ghouls and cannot, even by straining its language, be made to cover the acts of persons proceeding within their legal and contract rights." *Reichelt v. St. Vincent DePaul Cemetery Ass'n*, 10 Teiss. 100, *2 (La. Ct. App. 1913).

192. *Reichelt*, 10 Teiss at *2.

193. While lawful disinterment is not restricted, Louisiana law looks unfavorably on it. See *Bunol v. Bunol*, 127 So. 70, 70 (La. 1930) (allowing a surviving spouse to remove and relocate deceased spouse's remains because wife believed the burial place was temporary). See also *Choppin v. Labranche*, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); T. SCOTT GILLIGAN & THOMAS F.H. STUEVE, *MORTUARY LAW* 49-53 (9th ed., 2005) (1940) (noting that disinterment is generally disfavored).

194. MITFORD, *supra* note 4, at 97-98. See generally *Jeane*, *supra* note 164.

195. BERNARD, *supra* note 113, at 70-71.

cemeteries.¹⁹⁶ In the case of *In re St. James Methodist Church of Hahnville*, the Louisiana Fifth Circuit observed that,

[t]he owner [of property on which a cemetery is located] is bound to the following: (1) He cannot remove or disturb any grave. (2) *Relatives and friends have unrestricted rights to visit and care for the graves.* (3) Property included in the cemetery cannot be used by the owner for any purpose inconsistent with cemetery purposes. (4) The owner cannot reduce the size of the lands set apart as a cemetery.¹⁹⁷

Although access to isolated cemeteries is provided for by Louisiana jurisprudence, it is also likely that the right of passage would, by analogy, be subject to the typical restrictions that may be placed on a dominant servitude holder by a servient estate. These limitations may include reasonableness as to the times of day during which access may occur;¹⁹⁸ making a route available that is not the shortest,¹⁹⁹ but is the least disruptive to the current landowner;²⁰⁰ and allowing for damages to the current landowner for reckless or injurious acts by the cemetery visitor,²⁰¹ to name a few.²⁰²

Although the above analysis demonstrates a sufficient legal basis for the descendants of someone buried in an isolated cemetery to have access

196. For the purposes of this article, the term “isolated cemetery” refers to those cemeteries that have become separated from easy access due to property transfers and the like, typically causing them to lie wholly within the property of someone unrelated to the descendants of those interred in the cemetery.

197. *In re St. James Methodist Church of Hahnville*, 95-410, p. *6 (La. Ct. App. 5 Cir. 12/27/95); 666 So. 2d 1206, 1209 (emphasis added) (citing *Vidrine v. Vidrine*, 225 So. 2d 691, 697 (La. Ct. App. 3 Cir. 1969)). See also *Roberts v. Stevens*, 389 So. 2d 782, 785 (La. App. 3 Cir. 1980). The limited scholarly commentary on this subject is also in agreement with the Louisiana jurisprudence. See, e.g., BERNARD, *supra* note 113, at 77 (stating that “the new owner must permit reasonable access to family members wishing to visit the graves.”). See also *Trefry v. Younger*, 114 N.E. 1033, 1034 (Mass. 1917); *Nicholson v. Daffin*, 83 S.E. 658, 660 (Ga. 1914).

198. LA. CIV. CODE art. 728 (2009).

199. LA. CIV. CODE ANN. art. 692 (2009). See also *Bailey v. McNeely*, 06-629, p. *8-*9 (La. Ct. App. 3 Cir. 12/30/05); 918 So. 2d 1124, 1129-30.

200. LA. CIV. CODE ANN. art. 743 (2009). See, e.g., *Cash Point Plantation Equestrian Cent., Inc. v. Shelton*, 40,647 (La. Ct. App. 2 Cir. 1/25/06); 920 So. 2d 974.

201. LA. CIV. CODE ANN. art. 689 (2009). See, e.g., *Bouser v. Morgan*, 520 So. 2d 937 (La. Ct. App. 3 Cir. 1987).

202. Further seeking guidance from analogies to servitudes under the Louisiana Civil Code, then-Judge Tate characterized a public cemetery dedication as a “real right in the nature of a servitude” acquired by usage allowed with the consent of the landowner. *Vidrine v. Vidrine*, 225 So. 2d 691, 699 (La. Ct. App. 3 Cir. 1969). In his dissenting opinion, Judge Tate noted that, with respect to the right of access, the property owner “can do nothing tending to diminish its use, or make it more inconvenient.” *Id.* at 699 (citing former Civil Code Art. 777; current LA. CIV. CODE ANN. art. 748 (2009)). Thus, reasonableness in both the exercise and the provision of the right of access to isolated cemeteries is the underlying policy prompted by the jurisprudence of this State.

across the property of another for the purposes of visiting and maintaining the cemetery, other issues are also relevant. As previously discussed, the importance of historic cemetery preservation is paramount in Louisiana. Thus, the facilitation of access to such cemeteries,²⁰³ which most isolated cemeteries necessarily are, is extremely important in the interest of preserving these sacred and historically significant sites.

8. STATE LAW SHORTCOMINGS

a. Laws Permitting Impacts to Cemeteries

Unfortunately, while Title 8 does provide some mechanisms for maintaining cemeteries without destroying them, other provisions of Louisiana law do permit destruction under some circumstances. The most important of these is the law related to expropriation. In most, if not all instances, the expropriation of cemetery property will occur in advance of construction activities.²⁰⁴ The legal issues dealing with Louisiana cemeteries that may be impacted by construction are fairly complex. The legislation applicable to these matters is spread over several portions of the Revised Statutes, which makes gaining a clear picture of the relevant law difficult.

i. General Expropriation Law

The general provisions of expropriation law in Louisiana are found at La. R.S. § 19:1, *et seq.* Under this law, when a price for purchasing property needed for a public purpose²⁰⁵ cannot be agreed upon by the

203. The definition of a “historic cemetery” as used herein comes largely from the definition in Act 600 of the 2008 Regular Session of the Louisiana Legislature, which states that cemeteries eligible for the Louisiana Historic Cemetery Register must meet the following criteria:

No cemetery shall be considered for placement on the state register unless it is at least fifty years old, or contains the burial of a person of local, state, or national importance by reason of civic, public or military service, cultural achievement, or historical significance, or contains structures that are considered architecturally significant.

LA. REV. STAT. ANN. § 25:914(C) (2009). Section 914(C)’s definition of “historic” is consistent with the definition of that term in the National Historic Preservation Act. *See* 16 U.S.C. §470 (2006).

204. Governments and developers should be extremely wary of cemetery relocations. In addition to the reality that disinterments are disfavored under the law, such actions often disturb hornets’ nests of public sentiment that can either bog matters down in the courts for long periods of time or create terrible public relations messes or both. *See, e.g.,* Megan Matteucci, *Families Keep Up Fight Against Moving Graves*, ATLANTA J.-CONST. Jan. 9, 2009, at C1; Associated Press, *Texaco Wins Fight for Burial Grounds*, TIMES PICAYUNE June 9, 1998, at C2; Elizabeth J. Himelfarb, *Cover-Up at City Hall?*, <http://www.archaeology.org/9909/newsbriefs/cityhall.html>.

205. It is interesting to note that the term “public purpose” for the purposes of expropriation has been the subject of much debate in recent years. Following the United States Supreme Court decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), many state legislatures—

expropriating authority²⁰⁶ and the owner, certain properties may nonetheless be expropriated for public purposes, including:

the construction of railroads, toll roads, or navigation canals;²⁰⁷

the construction and operation of street railways, urban railways, or inter-urban railways;²⁰⁸

the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;²⁰⁹

construction for the transportation of natural gas;²¹⁰

the erection of telephone or telegraph lines;²¹¹

the erection of electricity lines and the construction of the

Louisiana's among them—quickly moved to enact state-level protections against the taking of private property for private purposes. Louisiana's version was enacted as Act 851 of the 2006 Regular Session. *See* H.B. 851, 2006 Leg., Reg. Sess. (La. 2006) (amending LA. CONST. art. I, § 4, art. VI, § 21). Although most government projects will likely fulfill the classification of a “public purpose” to which *Kelo* and Act 851 do not apply, a review of these sources, as well as La. Atty. Gen. Op. No. 07-0147, may be warranted in future cemetery expropriation situations.

206. The term “expropriating authority” generally applies to governmental entities and the private entities with the authority to carry out the activities listed in LA. REV. STAT. ANN. § 19:2 (2009).

207. LA. REV. STAT. ANN. § 19:2(2) (2009).

208. *Id.* § 19:2(3).

209. *Id.* § 19:2(4).

210. *Id.* § 19:2(5). It should also be noted that, although general expropriation rules permit expropriation for the construction of hydrocarbon pipelines, the exploration for and production of minerals is expressly prohibited within the confines of a cemetery in Louisiana. LA. REV. STAT. ANN. § 8:901 (2009). One outstanding question is whether it also prohibits seismic activity within such cemeteries. The law clearly prohibits “prospecting” within cemeteries. There is no Louisiana jurisprudence that defines prospecting in terms of conducting seismic surveys. It should be noted that there is no jurisprudence stating that seismic surveys are not “prospecting.” Thus, it has apparently not been an issue before the Louisiana courts. However, several other states’ jurisprudence includes seismic activity within the term “prospecting.” *See, e.g., Meyer v. Berg*, No. 06-998, 2007 WL 1430226, at *1 (E.D. Wis. May 14, 2007); *Trutec Oil & Gas, Inc. v. W. Atlas Int’l, Inc.*, 194 S.W.3d 580, 580 (Tex. App. 14 Dist. 2006). Thus, it seems safe to say that the “prospecting” referred to in section 901 does indeed include seismic operations. Accordingly, under Louisiana law, such activities are likely prohibited in a cemetery. It should be noted, however, that as a policy matter, the Louisiana Cemetery Board has taken the position that directional drilling under cemeteries is permissible and is not a violation of section 901. E-mail from Lucy L. McCann, Director, Louisiana Cemetery Board, to Ryan M. Seidemann, Assistant Attorney General (Jan. 23, 2009, 09:54 CST) (on file with authors). It is important to note, however, that for the cemeteries covered by title 8, sections 671-681 of Louisiana’s Revised Statutes—ones over which the LCB has little or no jurisdiction—the same permissibility for directional drilling cannot be said with any certainty. The Louisiana Division of Archaeology has made no pronouncement indicating whether or not such activities are acceptable.

211. LA. REV. STAT. ANN. § 19:2(6) (2009).

infrastructure necessary to support such lines;²¹²
 the construction of other pipelines;²¹³ and
 various other provided-for activities.²¹⁴

Noticeably, anything that will impact cemetery property is excepted from this list of appropriate uses of expropriation power. Specifically, La. R.S. § 19:3 states that:

No graveyard or cemetery shall be expropriated unless the court finds that the route of expropriation cannot be diverted from that proposed by the plaintiff without great public loss or inconvenience.²¹⁵

It is unclear from the law in Title 19 what actually constitutes a “graveyard or cemetery” or what constitutes “loss or inconvenience.” For an appreciation of what constitutes a “graveyard or cemetery,” we must look to Title 8. As noted above, Title 8 defines a “cemetery” 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.²¹⁶

Although it not specifically defined by Title 8, the above definition of cemetery also must likely encompass the term “graveyard” as contemplated by La. R.S. § 19:3.²¹⁷ However, the terms “graveyard or cemetery,” as used in La. R.S. § 19:3 also encompasses the term “unmarked burial site,” which is defined by La. R.S. § 8:673 as:

the immediate area where one or more human skeletal remains are found in the ground that is not in a recognized and maintained municipal, fraternal, religious, or family cemetery, or a cemetery authorized by the Louisiana Cemetery Board.²¹⁸

As for what constitutes a “loss or inconvenience,” there is some

212. *Id.* § 19:2(7).

213. *Id.* § 19:2(8)-(10).

214. *Id.* § 19:2(11).

215. LA. REV. STAT. ANN. § 19:3 (2009).

216. LA. REV. STAT. ANN. § 8:1(7) (2009).

217. This is consistent with the common usage of the term “graveyard” as defined by the Oxford English Dictionary. That source simply defines the term as “a burial ground.” OXFORD ENGLISH DICTIONARY, *supra* note 126, at Vol. VI, at 787. See also BERNARD, *supra* note 113, at 69.

218. LA. REV. STAT. ANN. § 8:673 (2009).

jurisprudential guidance in this regard. In *City of New Orleans v. Christ Church Corp.*,²¹⁹ the Louisiana Supreme Court found that the La. R.S. § 19:3 requirement that a “great loss or inconvenience” which must exist before the expropriation of cemetery property has been met when cemetery property “is vitally needed for street purposes.”²²⁰ Thus, it is probable that any project for which a reasonable public purpose can be articulated will likely pass the *Christ Church* test, allowing construction through a cemetery property.

ii. Applicable Cemetery-Specific Law

With the allowances for expropriation in mind, we turn to the applicable provisions of Title 8. The law in this Title places further limitations on the use of cemetery property for non-cemetery purposes.

1. Expropriation of Cemetery Property When Burials Will Not be Disturbed

If cemetery property must be used for a particular project, the property will have to be acquired from its owners. This can be done either through purchase or expropriation. Generally, before anyone can go the route of expropriation, a good faith effort must be made to identify and contact the cemetery authority²²¹ and the owners of interment rights in the cemetery. These requirements are embodied in La. R.S. § 8:316, which provides:

After dedication pursuant to this title, and as long as the property remains dedicated to cemetery purposes, no railroad, street, road, alley, pipe line, pole line or other public thoroughfare or utility shall be laid out, through, over or across any part of it without the consent of the cemetery authority owning and operating it. If said cemetery authority is not in existence or not operating, then the consent of not less than two-thirds of the owners of interment spaces shall be required.²²²

Although La. R.S. § 8:316 initially appears to conflict with the law of expropriation, a closer examination shows that it is merely intended to slow the “march of progress.” While La. R.S. § 8:316 is intended, as is La. R.S. § 19:3, to dissuade the use of cemetery property for other purposes—and

219. *City of New Orleans v. Christ Church Corp.*, 81 So. 2d 855, 858 (La. 1955).

220. *Id.* This is fairly consistent with the federal Fifth Circuit’s admonition in *Travelers Ins. Co. v. Welch*, 82 F.2d 799 (5th Cir. 1936), that human remains should only be disturbed for “necessary or laudable purposes.” *Welch*, 82 F.2d at 801.

221. Title 8 of the Louisiana Revised Statutes defines “cemetery authority” as “any person, firm, corporation, limited liability company, trustee, partnership, association or municipality owning, operating, controlling or managing a cemetery or holding lands within this state for interment purposes.” LA. REV. STAT. ANN. § 8:1(9) (2009).

222. LA. REV. STAT. ANN. § 8:316 (2009).

indeed, to restrict such other purposes when human remains are still interred on the property—it is not an absolute bar to the reuse of cemetery property.

In the event that there is no cemetery authority managing the property, the next step would be to seek authority from those owning interment rights in the cemetery for permission to use the property for non-cemetery purposes.²²³ Title 8 does provide for the heritability of such rights, and due diligence may involve making a good faith effort to locate the descendants of those known to be interred in a cemetery.²²⁴ This endeavor may indeed prove to be a difficult one. Because many cemeteries predate the existence Title 8's requirements that govern how cemetery authorities are to function,²²⁵ in many cases, no written records will exist to evidence interment rights that may be identifiable from the successions who originally owned the rights, aside from tombstone inscriptions. This scenario presents a conundrum that is not contemplated by Title 8. In the absence of both a cemetery authority and identifiable owners of interment rights, the standard procedure for expropriation is probably appropriate when it can be shown that no burials will be disturbed in a planned construction project.²²⁶

2. Dedication of Property for Cemetery Use

The “dedication” referred to in La. R.S. § 8:316, *supra*, is the dedication of property for cemetery purposes under La. R.S. § 8:304. There is no distinction in the law as to whether cemetery property becomes “dedicated” simply by virtue of its use as a cemetery or if something must be filed into court records to effectuate the dedication. The LCB's position has consistently been that it is merely the use of property as a cemetery that effectuates the dedication.²²⁷ Due to the generally inviolate status

223. This concept is not explicitly stated in the law. However, taking a cue from title 8, section 308 of Louisiana Revised Statutes, the successors to the deceased clearly have an interest in what occurs in their ancestors' cemetery and not to consult them or at least make a diligent effort to locate them seems to be an invitation for a *Humphreys*-style lawsuit. *See id.* § 8:308.

224. *See* LA. REV. STAT. ANN. § 8:803 (2009).

225. Most of Title 8 was enacted by the Louisiana Legislature in 1974.

226. In the event that unmarked burials will be disturbed, title 8, sections 671-681 of the Louisiana Revised Statutes would apply and would control what law to follow. *See* LA. REV. STAT. ANN. §§ 8:671-681 (2009).

227. This policy position of the LCB is consistent with the Louisiana Supreme Court's appreciation of the term “dedication” with regard to cemetery property in *Humphreys v. Bennett Oil Corp.* 197 So. 222, 222 (La. 1940). In *Humphreys*, the Louisiana Supreme Court noted that:

the intention to dedicate this plot of ground to use as a cemetery was first unequivocally manifested by Dr. Tomlinson in 1892 when he, with the assistance of others interested, laid off and established its four corners. It was then being used as a burial ground and had been so used for many years prior thereto. It was part of his property, and his marking it off as he

cemeteries hold within our culture, the LCB's position is likely the Legislature intended with La. R.S. § 8:304. Accordingly, even after the owners or cemetery authority have been contacted pursuant to La. R.S. § 8:316, and (if necessary) the remains have been removed, the property is still subject to the restrictions embodied in La. R.S. § 8:304, that is, until the dedication has been removed pursuant to La. R.S. § 8:306-307.

The dedication cannot be removed until all remains have been properly withdrawn from the portion of the cemetery that will be affected by a project.²²⁸ In addition, only a court can remove the dedication.²²⁹ Once any remains have been removed from the impacted area, the party seeking to use the cemetery property for non-cemetery uses may apply for a declaratory judgment to the district court for the parish in which the cemetery is located seeking an order that the cemetery dedication should be removed.²³⁰ In addition, La. R.S. § 8:306 requires that notice of such an action be served upon the LCB.

3. Expropriation of Cemetery Property When Burials Will be Disturbed

When burials will be disturbed, two different sets of expropriation rules may apply. The first set of rules applies to "marked" burials and the second to "unmarked" burials. Because unmarked burials are discussed in a separate part of this Article, only marked burials are considered here.

In situations in which marked burials²³¹ are to be disturbed by a planned project, these burials must be moved prior to any construction activity. Moving human remains from an interment cannot be a unilateral activity. Title 8 provides a specific schedule of individuals who must give permission for moving human remains.²³² Louisiana Revised Statute section 8:659 provides that:

A. The remains of a deceased person may be moved from a cemetery

did shows clearly that he intended to segregate it from his other property.

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.

Humphreys v. Bennett Oil Corp. 197 So. 222, 226-27, 229 (La. 1940).

228. LA. REV. STAT. ANN. § 8:306 (2009).

229. *Id.*

230. *Id.*

231. The term "marked burials" as used herein, refers generally to burials in cemeteries that are regulated by the LCB (i.e. those under the jurisdiction of the Unmarked Burials Act, LA. REV. STAT. ANN. §§ 8:671-681 (2009)).

232. *Id.* § 8:659.

space to another cemetery space in the same cemetery or to another cemetery with the consent of the cemetery authority and the written consent of one of the following, in the order named, unless other directions in writing have been given by the decedent:

- (1) The surviving spouse, if no petition for divorce has been filed by either spouse prior to the death of the decedent spouse.
- (2) The surviving adult children of the decedent, not including grandchildren or other more remote descendants.
- (3) The surviving parents of the decedent.
- (4) The surviving adult brothers and sisters of the decedent.

B. If the required consent cannot be obtained, a final judgment of the district court of the parish where the cemetery is situated shall be required.²³³

Following a good faith effort to locate and obtain permission from the individuals listed in La. R.S. § 8:659(A)(1)-(4), a court may be petitioned pursuant to La. R.S. § 8:659(B) for the removal of remains. Because most cemeteries impacted by planned construction will likely be historic, the requisite individuals in La. R.S. § 8:659(A)(1)-(4) may no longer be living. In addition, there will likely be no cemetery authority associated with such cemeteries. Once those facts have been established, the party wishing to move the remains must follow the procedure in La. R.S. § 8:659(B). Although La. R.S. § 8:659 does not contemplate a party other than the cemetery authority seeking such a judgment from a court, it is apparent that this oversight was not intended to stifle future generations from, as a matter of last resort,²³⁴ using former cemetery property for other purposes. Accordingly, in the absence of a cemetery authority, the party wishing to move remains pursuant to La. R.S. § 8:659(B) may petition a court for such removal.

It is interesting to note that, in one of the few reported cases dealing with expropriation issues related to cemeteries,²³⁵ the Louisiana Supreme

233. La. Rev. Stat. Ann. § 8:659 (2009).

234. The statement that this should be a matter of last resort is in reference to the requirement of title 19, section 3 of the Louisiana Revised Statutes that the taking of cemetery property for other purposes under expropriation must be done pursuant to a vital need. See LA. REV. STAT. ANN. § 19:3 (2009). An interesting case in the Louisiana First Circuit, however, has recently allowed title 8, sections 658 and 659 of the Louisiana Revised Statutes to be used by someone other than a cemetery authority. See *Gilmore v. Whited*, 08-1808 (La. Ct. App. 1 Cir. 3/31/09); 9 So.3d 296. In *Gilmore*, the court allowed an estranged father to use sections 658 and 659 to support a cause of action to move the remains of his deceased daughter. *Id.* at 301-02. Although the case is merely an appeal of procedural matters, the court did permit a non-cemetery authority to use those laws and, in addition, found that the 60-day period noted in section 658 not to be prescriptive in nature (i.e., cases brought under that law need not be brought within 60 days). *Id.*

235. *City of New Orleans v. Christ Church Corp.*, 81 So. 2d 855, 858 (La. 1955).

Court required the appointment of a curator-ad-hoc to represent the interests of the unknown individuals interred in Girod Cemetery in New Orleans during the expropriation process. This appointment was based on former Louisiana Civil Code Article 56, which stated:

If a suit be instituted against an absentee who has no known agent in the State, or for the administration of whose property no curator has been appointed, the judge, before whom the suit is pending, shall appoint a curator ad hoc to defend the absentee in the suit.²³⁶

Following the passage of Act 989 of 1990, this article no longer exists.²³⁷ Accordingly, it is probable that, in cases filed pursuant to La. R.S. § 8:659(B), there is no legal necessity for the appointment of a curator to represent the interests of those whose descendants cannot be found or identified following a diligent effort. However, the simple lack of necessity for such an appointment does not mean that a court could not, on its own motion, appoint such a curator, should it find that the circumstances warrant such an appointment—the requirement is merely no longer mandated by law.²³⁸

III. THE COMPREHENSIVE PROTECTION OF CEMETERIES UNDER LOUISIANA LAW: A COMBINED ANALYSIS OF TITLES 8, 14, AND 41

When examining the totality of pronouncements by the Louisiana Legislature as related to cemeteries, it is apparent that existing protections are fairly comprehensive. In Title 8, substantial restrictions on the alteration of grave spaces in operating cemeteries and even in abandoned cemeteries are present.²³⁹ Title 14 further restricts any intentional or

236. La. Civ. Code art. 56 (2009).

237. This is probably appropriate, as the law behind this appointment related to absent persons, which the dead are certainly not under the provisions of articles 47-53 of the Louisiana Civil Code, particularly because articles 54-59 of the Louisiana Civil Code deal specifically with the distinction between dead people and absent people. See LA. CIV. CODE art. 47-59 (2009).

238. This explication is consistent with the change in the law noted in comment a to article 47, of the Louisiana Civil Code. LA. CIV. CODE art. 47 cmt. a (2009). It should be noted, however, that other states have appointed similar curators for “unknown and unrepresented persons who may be interred in” a cemetery. See Judgment Entry, *In Re* The Matter of the Removal of Human Remains from Cemeteries in Kansas City, Platte County, Missouri, No. 07-0593 (Cir. Ct. Platte County, Missouri Apr. 17, 2008). Accordingly, the concept is not an antiquated notion, it is just no longer mandatory in Louisiana. It may be argued, however, that the LCB serves this function today through the required notice that is to be served on that body. However, because there is no reported case of the LCB ever opposing such activities, this notion is nothing more than speculation.

239. LA. REV. STAT. ANN. §§ 8:308, 8:903-903.1 (2009).

criminally negligent damaging of grave spaces.²⁴⁰ Title 41 provides that alterations to cemeteries on state property must be vetted through a Division of Archaeology permitting process.²⁴¹ In addition, Title 8 mandates that the alteration of any unmarked human burial site must be done pursuant to a Division of Archaeology permit.²⁴²

In addition to these state law protections, federal law applicable in Louisiana also provides some measure of protection for cemeteries. NEPA, the NHPA, and ARPA establish requirements for consideration and permitting of historic and archaeological sites (including cemeteries) on federal land and in project areas involving federal funding or federal permitting.²⁴³ Section 4(f) virtually requires avoidance of cemeteries during federal highway construction.²⁴⁴ Further, NAGPRA provides absolute protection for Native American burial sites found on federal or tribal land.²⁴⁵

Considering the foregoing brief review, where do the holes exist in the existing law protecting historic cemeteries? The combined protections of state and federal law were obviously never intended, with the exception of Title 41, to protect historic resources. In this regard, the Title 8 protections against destruction of grave spaces are aimed at cemetery authorities and not descendants.²⁴⁶ Thus, descendants could dismantle historic grave spaces without regard to the preservation of the historic record. In addition, there is no requirement that cemetery authorities comply with historically accurate standards when doing repair and maintenance work.²⁴⁷ Further, the bulk of the state and federal law, with the exception of the Unmarked Burials Act and NAGPRA, does not apply to cemeteries on private land.²⁴⁸ Thus, if repairs or dismantling is done on cemeteries on private property with no historic documentation requirement, preservation, or mitigation, substantial social and scientific data will be lost, compromising the historic aesthetic of these sites.²⁴⁹ In addition, if remains are exhumed and reburied

240. *Id.* § 14:101.

241. *Id.* § 41:1601.

242. *See id.* §§ 8:671-681.

243. *See generally* discussion *supra* Part II.A.

244. *Id.*

245. 25 U.S.C. §§ 3001-3010 (2006).

246. LA. REV. STAT. ANN. §§ 8:308, 8:903-903.1 (2009).

247. There is no law on this, but the absence of any such requirements in title 8, sections 308 and 903-903.1 make clear that this was not the Legislature's intent with those laws.

248. This statement refers to the reality that most federal law requires a tie to federal or tribal land or to federal funds or activities to have effect and to the reality that State law protections for cemeteries, aside from the Unmarked Burials Act, can only apply to archaeological sites on State land.

249. LYNETTE STRANGSTAD, A GRAVEYARD PRESERVATION PRIMER 87 (1995). This

with no analysis pursuant to a permit, vast stores or scientific data will be lost.²⁵⁰

statement is consistent with the general idea that the loss of historic resources, which are irreplaceable, represents a significant loss to culture as a whole. As with traditional archaeological sites, cemeteries contain important information on the lives of past peoples—both through the visible markers and the less visible human remains. *Id.* Indeed, through the cultural information that can be gleaned from cemeteries, one scholar of Louisiana's necropolises has called them "a microcosmic representation of Louisiana culture." Tadashi Nakagawa, *Louisiana Cemeteries: Manifestations of Regional and Denominational Identity*, in XI MARKERS 29 (Richard E. Meyer ed., 1994). The notion of cemeteries as scientific data sources is not new. Indeed, archaeologists have been testing methods and theories in historic cemeteries for some time. *See, e.g.*, Paula J. Fenza, *Communities of the Dead: Tombstones as a Reflection of Social Organization*, in VI MARKERS 137 (Theodore Chase ed., 1989). Even if well-intentioned restoration or reuse activities occur in these cemeteries, the alteration of the historic record without documentation results in a loss of this information forever. *See generally* LYNETTE STRANGSTAD, A GRAVEYARD PRESERVATION PRIMER (1995).

250. The scientific value of the study of human remains cannot be understated. *See, e.g.*, ELIZABETH WEISS, REBURYING THE PAST: THE EFFECTS OF REPATRIATION AND REBURIAL ON SCIENTIFIC INQUIRY 5-23 (2008). The uses of these remains can largely be divided into two categories: the study of general human history and medical/forensic applications. *Bones of Contention*, *supra* note 159, at 550. Specifically, as Seidemann has noted,

On a very simple level, data gleaned from the study of human skeletal remains can provide insights into population movement and migration as well as the specific genetic composition of individual populations. Additionally, skeletal studies provide insights into pathological conditions and their interaction with humankind. Such studies allow for the interpretation of the interactions of humankind with various diseases and have applications to both the study of past peoples and the investigation of crime-related modern human remains. Examinations of dentition and skeletal remains have led to the reconstruction of prehistoric diets and health patterns, a necessity to understanding the complexities of past cultures.

On a more practical level, the study of ancient human skeletal remains contributes to contemporary medical fields. An example of the relevance of studying ancient remains to current medical issues is the use of DNA analyses of skeletal remains to provide insights into thalassemia. Thalassemia is described as "a group of anemias caused by a variety of genetic mutations at different sites of the gene coding for the structure of the globulin chains of hemoglobin." Skeletal research on this disease, which generally affects individuals of Middle Eastern descent and results in anemic symptoms varying in severity, has been conducted by Ariela Oppenheim in Israel in the hopes of identifying data from DNA analyses that may lead to a medical cure.

Perhaps an even more common use for human skeletal studies is in their forensic applications. Many of the techniques presently in use in the identification of war dead, victims of mass disasters, and the victims of crimes were and continue to be developed on prehistoric human remains. One example of this is a recent sexing method for skeletal remains that was initially devised and tested on a six thousand year old Native American archaeological sample and has since been developed into a forensic identification method and applied to the identification of American war dead from Southeast Asia. Additionally, nondestructive studies are currently being used to identify relationships between diet and dental pathologies. Finally, the once extensive comparative indigenous skeletal collections around the world were (and to a much lesser degree, continue to be) "used in educating medical scientists concerning bone biology and human variation."

Id. at 551-53. *See also* ENGLISH HERITAGE, GUIDANCE FOR BEST PRACTICES FOR TREATMENT OF HUMAN REMAINS EXCAVATED FROM CHRISTIAN BURIAL GROUNDS IN ENGLAND 10 (2005). It is doubtful that title 14, section 101 of the Louisiana Revised Statutes restricts scientific analysis even for remains that are simply being removed for the purposes of reburial elsewhere. This

IV. DISCUSSION

The foregoing analysis demonstrates that a complex scheme to support some level of preservation exists pertaining to virtually all cemeteries in Louisiana, but that much of that protection is minimal. Cobbling together Titles 8, 14, and 41 of the Louisiana Revised Statutes, as well as various federal laws, the authors cannot conceive of any Louisiana cemetery not afforded at least some measure of preservation-related protection. However, the weaknesses of laws such as La. R.S. §§ 8:308, 8:903, and 8:903.1 as far as requiring historically accurate restorations, not to mention the costs involved and other problems beyond the scope of the existing law, makes many of these protections theoretical rather than actual.

The existing protections under Louisiana law all assume several things: (1) that those doing restoration work in cemeteries not under the authority of the Unmarked Burials Act are also not descendants (thus possessing the right to destroy grave spaces); (2) that there is someone attached to each Louisiana cemetery who cares enough to maintain the site; (3) that preservation and maintenance either does not cost much or that funding is available; (4) that all damage and decay within cemeteries occurs at the hands of humans; and (5) that all well-intentioned work undertaken in cemeteries is helpful. The only way for every cemetery in Louisiana to actually benefit from the existing protections is for each of the above components to be met. However, as we shall see, it is seldom that all of these factors are in alignment. Going one step further—as the four assumptions above merely relate to avoiding destruction—there is no legal requirement outside of whatever permit conditions the Division attaches to an Unmarked Burials Act permit that mandates historically accurate reconstructions of grave spaces. Each of these shortcomings and the problems entailed are analyzed in this Part.

A. DEMOLITION BY DESCENDANTS

As noted in previous sections, if a cemetery is not subject to the jurisdiction of the Unmarked Burials Act, the restrictions against demolition of grave spaces under La. R.S. §§ 8:308, 8:903, and 8:903.1 apply. However, because descendants occupy a unique position of control over their ancestors' final resting places and because descendants are not so barred by law, there is no reason why they could not order the demolition of a grave space, so long as the rules related to the treatment of human remains

likely does not rise to the level of desecration. However, it is also important to note that, even when remains are removed pursuant to a Title 8 court order, there is nothing that requires scientific analysis of those materials, thus causing the loss of information.

are followed.²⁵¹

The situation that results from this legal loophole is that, without regard to the historic or architectural importance of a grave space, descendants may tear that space apart for reuse or reconstruction as they see fit. This reality, in effect, means that the descendants' information is lost along with the potential social and scientific treasure of the grave marker itself. The harm done to society-at-large by allowing this destruction could easily be minimized by a statute requiring complete documentation of a grave space before renovation or demolition. Such documentation should include transcription of inscriptions and collection of demographic data, as well as photographing and drawing the grave space according to architectural standards. The impingement of such requirements on descendants would likely be minimal enough to pass constitutional muster (as it is not restricting reuse, but merely conditioning it).²⁵² One proposal for such legislation is as follows:

R.S. 8:903.2; Documentation of grave spaces

(A) Prior to any demolition or substantive renovations permitted by this Title, each grave space in the state shall be documented according to the following minimum standards:

Black and white and color photographs shall be taken at each elevation of an above-ground grave marker or structure and of each exposed surface of an in-ground grave marker;

251. There is no positive law on this point. However, because Title 8 does not explicitly place restrictions on descendants to keep them from modifying grave spaces, it can be inferred that such a right exists for descendants. This concept is also consistent with the pronouncements of the Louisiana courts. Although never addressing this issue, the courts have consistently found in favor of descendants for wrongs done to graves. *See, e.g., Humphreys v. Bennett Oil Corp.*, 197 So. 222, 228 (La. 1940). *See also Choppin v. Labranche*, 20 So. 681, 682 (La. 1896). One caveat must be borne in mind, as was seen in the cases involving the control of human remains, descendants can often disagree regarding the proper treatment of cemetery matters. *See, e.g., Byrd v. Byrd*, 488 So. 2d 1134, 1134 (La. Ct. App. 2 Cir. 1986); *In the Matter of Dufour*, 622 So. 2d 1181, 1181 (La. Ct. App. 5 Cir. 1993); *Speiss v. Greenwood Dev. Co.*, 542 So. 2d 810, 810 (La. Ct. App. 3 Cir. 1989). Thus, in order for descendants to avoid lawsuits from their relatives, it is advisable that all, or as many as possible, descendants should approve of any demolition in writing before such activities commence.

252. The Louisiana courts have been fairly amenable to legislation that imposes restrictions on private property for the general betterment of the public at large. *See, e.g., MJ Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371 (La. 7/1/08); 998 So. 2d 16 (finding no constitutional violations of a recent act that imposed some delays and extra obligations on landowners that sue for certain environmental damages to their property). The impositions embodied in Act 312 of 2006 are much more substantial than those suggested herein, thus making these even stronger candidates for passing constitutional muster than those imposed by Act 312 (which was maintained as constitutional by a unanimous court).

Architectural plans shall be drawn of all grave markers;
 All inscriptions shall be photographed and recorded;
 All demographic data shall be recorded; and
 GPS locational data shall be recorded for each grave space.

(B) All information so collected shall be filed with the Louisiana Division of Archaeology. The Louisiana Division of Archaeology shall create an archaeological site file for each distinct cemetery for which data have been filed within which to store the filed information.

(C) The Louisiana Division of Archaeology is hereby empowered to draft regulations to carry out this section.

Thus, at a minimum, were future researchers to need original grave information for a particular altered grave space, that information will be available from a government repository.

B. THERE IS AT LEAST ONE PERSON WHO CARES

When cemetery damage that has gone unrepaired is discovered, the perennial question is: “Isn’t there someone who takes care of this?”²⁵³ In many cases, the answer to this question is “no.” Abandoned cemeteries are called “abandoned” for a reason—there is little or no burial and upkeep activity and no one to undertake such activity. With countless abandoned cemeteries around the state, when damage or vandalism occurs, it may go unnoticed for years.²⁵⁴ Naturally, when descendants of those interred in such cemeteries do notice the damage, they often become upset and look for someone to remedy the problem.²⁵⁵ However, as has been discussed, although the LCB and the Division may have permitting or other regulatory

253. Tyana Williams, *Residents Attempt to Get Overgrown Cemetery Cleaned*, WAFB (aired Dec. 31, 2008), <http://www.wafb.com/Global/story.asp?s=9600262>.

254. Such was precisely the case with recently discovered vandalism and decay in a West Baton Rouge cemetery. In this instance, local residents near the Silvery Cemetery in Port Allen reported destruction of an abandoned cemetery to the news media. When representatives of the West Baton Rouge Coroner’s Office and the Louisiana Department of Justice visited the site, it was apparent that the destruction, which appeared to be a combination of vandalism and neglect-related decay had occurred long before it was noticed by anyone.

255. See, e.g., Paul Gates, *Family Shocked By Cemetery Destruction* (WAFB aired Nov. 25, 2008), <http://www.wafb.com/Global/story.asp?s=9414449> [hereinafter *Family Shocked by Cemetery Destruction*]; Paul Gates, *Repair Process Begins at Cemetery With Damaged Caskets and Vaults* (WAFB aired Nov. 26, 2008), <http://www.wafb.com/Global/story.asp?s=9420845> [hereinafter *Repair Process Begins*]; Keitha Nelson, *Cemetery Repaired Following Damage to Tombs After Gustav* (WAFB aired Dec. 23, 2008), <http://www.wafb.com/Global/story.asp?s=9570511>. These stories report on destruction in a West Baton Rouge Parish cemetery caused by a tree fall during Hurricane Gustav in 2008. The damage included the tree crushing five above-ground vaults and exposing remains and caskets.

authority over many cemeteries in Louisiana, neither entity, nor any other governmental entity for that matter, has the authority or wherewithal to repair damaged or vandalized cemeteries.

In addition to the abandoned cemeteries that may fall into disrepair, Unmarked Burials Act exempt and LCB exempt cemeteries may also need attention. In such cases, it is the cemetery authority's primary responsibility to ensure upkeep,²⁵⁶ subject to the authority's allowances and descendants' rights in La. R.S. §§ 8:308, 8:903, and 8:903.1. In both of the above cases, such repairs are always subject to funding limitations. That said, it may be possible for descendants to maintain an action against a cemetery authority that has a contractual obligation to maintain the cemetery.²⁵⁷

Even in cases where perpetual care trust funds exist, it is not unheard of for those funds to be underfunded or misused,²⁵⁸ thus leading to a lack of cemetery upkeep. In such situations, the LCB has regulatory and legal authority to take action against such a cemetery.²⁵⁹ In addition, as noted above, the descendants of those who paid for perpetual care would also have an action against the cemetery authority.²⁶⁰ If the necessary funds have been squandered, it is questionable what good private actions might do in this situation, and it is likely that all that the LCB could hope for would be stopping continued violations of the law. Any criminal prosecution, while providing the descendants with some measure of vindication, would generally be at the discretion of the local district attorney (and secondarily the attorney general), unlikely to leading to actual restitution.

In the situations in which a municipality or other political subdivision is the owner—either outright or through abandonment—of a cemetery, a mandamus action for upkeep may be available if a legal

256. This notion is embodied in title 8, section 905 of the Louisiana Revised Statutes, which allows many Louisiana municipalities to enact ordinances requiring such upkeep by cemetery owners. LA. REV. STAT. ANN. § 8:905 (2009).

257. *See, e.g.,* *Nationwide Mut. Fire Ins. Co. v. Somers*, 591 S.E.2d 430, 430 (Ga. Ct. App. 2003) (discussing suit for failure to maintain a grave space covered by a perpetual care agreement); *Gray Brown-Service Mortuary, Inc. v. Lloyd*, 729 So. 2d 280, 280 (Ala. 1999) (same).

258. *See, e.g.,* *Bolton v. Stillwagon*, 190 A.2d 105, 105 (Pa. 1963) (discussing misuse of perpetual care funds); *Kentucky ex rel Gorman v. Kinnard*, No. 92-5890, 1993 WL 300425 (6th Cir. Aug. 3, 1993) (discussing underfunded cemetery funds of a Tennessee cemetery).

259. However, in the two reported instances where the LCB attempted to take such action, the appellate courts of this state, though we argue erroneously, have rebuffed these last-ditch efforts to protect consumers. *See Restlawn Park Cemetery, Inc. v. La. Cemetery Bd.*, 611 So. 2d 835 (La. Ct. App. 4 Cir. 1992); *State v. Twin Cities Mem'l Gardens, Inc.*, 43,568 (La. Ct. App. 2 Cir. 9/17/08); 997 So. 2d 16. *See also supra* text accompanying note 77.

260. *See supra* note 257 and accompanying text.

obligation for maintenance by the cemetery authority can be identified.²⁶¹ In the absence of such an obligation or when the cemetery is privately owned,²⁶² such an action would not be available; only actions to enforce specific contracts would be available.

There appears to be no easy or reasonable fix for the problem of the absence of a cemetery caretaker. As will be discussed *infra*, the funding issue has been addressed, with disappointing results. In 2008, the Louisiana Legislature considered two bills that would limit the establishment of new cemeteries that fall under a certain area of acreage.²⁶³ Ostensibly, the general idea behind this restriction was to limit the number of small cemeteries that quickly become uncared for and derelict. These bills failed in committee. Even if the bills had passed, they still would not have provided oversight for existing abandoned cemeteries at least insofar as for maintenance purposes.²⁶⁴ Under the legal structure that has existed throughout Louisiana history, it would be virtually impossible to go back and appoint caretakers for abandoned cemeteries where none had been required before.²⁶⁵

C. PRESERVATION/RESTORATION DOES NOT COST MUCH

As previously noted, funding is often a significant issue when accurate cemetery preservation or restoration is the end goal.²⁶⁶ Even

261. Mandamus is set forth in articles 3861-3864 of the Louisiana Code of Civil Procedure. See LA. CODE. CIV. PRO. ANN. art. 3861-3864 (2009). Such actions are limited to the compelling of a ministerial duty. LA. CODE. CIV. PRO. ANN. art. 3863 (2009). Thus, unless there is a legal requirement for upkeep (through local ordinance or otherwise) of a cemetery, mandamus is an inappropriate action to force such maintenance.

262. When dealing with private cemeteries, public entities are generally barred from using public funds or services to maintain private property. See, LA. CONST. art. VII, § 14(A); see also La. Att'y. Gen. Op. No. 90-630 (Jan. 15, 1991) (stating that a public funds cannot be used to maintain a privately owned cemetery); La. Att'y. Gen. Op. No. 04-0243 (Oct. 11, 2004) (same).

263. See S.B 345, 2008 Leg., Reg. Sess. (La. 2008); H.B. 729, 2007 Leg., Reg. Sess. (La. 2008).

264. The bills would only have restricted the prospective establishment of smaller cemeteries. It would not have done anything for the problems related to existing small and abandoned cemeteries. See S.B 345, 2008 Leg., Reg. Sess. (La. 2008); H.B. 729, 2007 Leg., Reg. Sess. (La. 2008).

265. Such a law with retroactive effect would impose duties in violation of the ex post facto provisions of both the United States and Louisiana constitutions. See U.S. CONST. art. I, § 9; LA. CONST. art. I, § 23. Though, admittedly, certain retroactive laws are permitted. See, e.g., *MJ Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371 (La. 7/1/08); 998 So. 2d 16. However, they are only permitted when they affect only procedural and not substantive rights. See generally *id.* Such would not be the case here.

266. Accurate restoration work is often incredibly expensive. See Jen Kiernan, *The Art of Restoration: The Marilyn Miller Mausoleum, Woodlawn Cemetery*, AM. CEM. 16 (Apr. 2006).

simple maintenance can often be costly.²⁶⁷ In terms of accurate preservation, though, a permanent funding source must be identified or created. Also as previously noted, in perpetual care cemeteries, when the perpetual care system works correctly, maintenance and even some restoration work may be feasible. However, there is no ready source of funding for preservation or maintenance for abandoned cemeteries and non-perpetual care cemeteries.²⁶⁸

In 2007 and 2008, legislation was introduced in Louisiana to create such a fund.²⁶⁹ Had the 2008 legislation passed, the source of funding would have been an additional amount added to the state-mandated burial transit permit.²⁷⁰ The proposed cost increase of \$10.00 per permit represents a tiny fraction of the overall cost of funeral services today.²⁷¹ As grants, these monies would be doled out to applicant cemeteries based upon need and other factors.²⁷² This method of providing for cemetery preservation was disfavored, however, and the bills never got any traction.²⁷³

The widespread lack of historic preservation funding sources for cemeteries generally has been an attendant problem to the lack of a funding source as proposed in 2007 and 2008 in Louisiana.²⁷⁴ Such problems are

267. See Edward J. Defort, *A Religious Experience*, AM. CEM. 3 (Mar. 2004) (commenting on the costs of cemetery maintenance). See also Marilyn K. Alaimo and Laura A. Turansick, *Preserving the Past and Planning the Future of a Cemetery*, AM. CEM. 24 (Jan. 2004) (discussing the increasing burden of maintaining a cemetery over time). See also E-mail from Rachel Witwer, Director of Save Our Cemeteries, Inc., to Ryan Seidemann, Assistant Attorney General (Feb. 17, 2009, 09:51 CST) (commenting that “simple maintenance/upkeep is a burden” (on file with authors)).

268. Greg Garland, *Gustav Disturbs Even the Dead: Burial Vaults Damaged*, THE ADVOCATE (Baton Rouge), Dec. 14, 2008, at 1B (noting that no funding mechanism exists for the restoration or maintenance of abandoned cemeteries). See also E-mail from Rachel Witwer, Director of Save Our Cemeteries, Inc., to Ryan Seidemann, Assistant Attorney General (Feb. 17, 2009, 09:51 CST) (commenting on the general lack of availability of funding for cemetery preservation projects and also noting that “restoration/preservation funds are not usually available for on-going maintenance which means that it’s a good chance that a restoration project can fall back into disrepair”) (on file with authors).

269. S.B. 302, 2007 Leg., Reg. Sess. (La. 2007); H.B. 1334, 2008 Leg., Reg. Sess. (La. 2008).

270. H.B. 1334, at § 1.2008 Leg., Reg. Sess. (La. 2008). S.B. 302 did not designate a funding source aside from grants to the fund. See S.B. 302, 2007 Leg., Reg. Sess. (La. 2007)

271. H.B. 1334, at § 1.2008 Leg., Reg. Sess. (La. 2008). See also E-mail from Rachel Witwer, Director of Save Our Cemeteries, Inc., to Ryan Seidemann, Assistant Attorney General (Feb. 17, 2009, 09:51 CST) (on file with authors).

272. H.B. 1334, at § 1.2008 Leg., Reg. Sess. (La. 2008).

273. E-mail from Rachel Witwer, Director of Save Our Cemeteries, to Ryan Seidemann, Assistant Attorney General (Feb. 17, 2009, 09:51 CST) (on file with authors).

274. Such funding problems are perennial for historic cemeteries. See, e.g., Thomas A. Parmalee, *New Opportunities*, AM. CEM. 22, 25 (Jan. 2009) (noting funding problems in New

not limited to abandoned cemeteries. With respect to funding for historic resources in operating cemeteries, the cemetery industry has also commented on the difficulty of raising funds to support monument restoration, research and archival projects, educational programming, tree-planting initiatives, and attempts to preserve the landscape of the cemetery.²⁷⁵ Without a regular source of funding available for preservation, the problems of degradation and deterioration will continue in Louisiana.

Another essential component to be considered when proposing that funding be available for historic cemetery restoration and preservation is the relationship of perpetual care cemeteries to the historic treasures within their control.²⁷⁶ Simply requiring that restoration be accomplished in perpetual care cemeteries using only perpetual care funds ignores the possibility that sometimes the widespread deterioration within cemeteries will be more expensive to accurately repair than a perpetual care fund can support.²⁷⁷ Although perpetual care funds should serve as the primary basis for repairs in cemeteries in which such funds are available, restoration funds should be available for substantial undertakings in perpetual care cemeteries as well. Such a scenario would assist in making such a funding proposal more palatable to the cemetery industry.²⁷⁸

It is imperative that all cemeteries have access to reconstruction funding. Even the perpetual care cemeteries are storehouses of our shared cultural heritage,²⁷⁹ and to deny funding to such cemeteries merely based on their classification as perpetual care cemeteries could cause untoward

Jersey for the historic Steelmantown Cemetery). See also Susan Olsen, *Outdoor Museums: Cemetery Success in the World of Fundraising*, AM. CEM. 22, 22 (Sept. 2008) (commenting on the competitiveness of acquiring such funds).

275. Olsen, *supra* note 274, at 22.

276. Olsen, *supra* note 274, at 22.

277. The reality that perpetual care funds may not be sufficient to cover historic preservation efforts in cemeteries is compounded when one considers that the availability of such funds are subject to market fluctuations. See generally Daniel M. Isard, *Facing Down the Economy: What You Need to Do to Survive*, AM. CEM. 14 (Jan. 2009) (noting that “the interest earnings many cemeteries have depended on will not be there” when the financial markets are in bad shape). This is because, by law, the principle in perpetual trust accounts cannot be invaded and it is the interest on these funds that is used to do routine maintenance and other restoration work. Because many such funds are investment-based, the available interest will diminish in hard economic times.

278. See Testimony of Mr. Boyd Mott, Chairman, Louisiana Funeral Directors Association, H.B. 1092, 2008 Leg., Reg. Sess. (La. 2008), considered before the House Committee on Municipal, Parochial, and Cultural Affairs, 2008, at 46:00, available at http://house.louisiana.gov/rmarchive/Ram/RamMay08/0529_08_MPC.ram.

279. See, e.g., HENRI A. GANDOLFO, *METAIRIE CEMETERY: AN HISTORICAL MEMOIR* (1981) (reviewing the volumes of New Orleans history contained within the perpetual care cemetery, Metairie Cemetery).

consequences for that heritage.

D. HUMANS ARE ALWAYS THE DIRECT CAUSE OF CEMETERY DESTRUCTION

The great bulk of the protections for cemeteries in Louisiana discussed herein assume that alterations to the cemeteries are done at the hands of people. For example, La. R.S. § 8:308, La. R.S. § 8:671, *et seq.*, La. R.S. § 8:903, and La. R.S. § 8:903.1 all regulate what people can and cannot do to various types of cemeteries. However, as Hurricanes Katrina, Rita, Gustav, and Ike have taught us, a considerable amount of the damage that people are legally restricted from causing may also be occasioned by the uncontrollable forces of nature.²⁸⁰ The damage these storms have caused to cemeteries in Louisiana has been the subject of much discussion elsewhere²⁸¹ and ranges from trees falling on tombs²⁸² to storm surges moving grave contents over vast areas.²⁸³ When this type of damage occurs, no amount of regulation can have any impact on minimizing the destruction.²⁸⁴ However, a whole different suite of laws comes into play when such damage does occur. A brief review of the relevant issues and law is prudent here.

Natural disasters, among other forces, have proven on numerous occasions that human remains can and will become disinterred and sometimes will be forcibly moved to a new location.²⁸⁵ When this occurs, Federal Emergency Management Administration (FEMA) laws and regulations become extremely important. Unfortunately, FEMA rules merely classify human remains and cemetery artifacts as a form of debris.²⁸⁶

280. In addition to Louisiana, cemeteries in the rest of the nation are not immune to natural disaster damage. *See, e.g.*, Minda Powers-Douglas, *Chippianock Cemetery's Storm of the Century*, EPITAPHS, Fall/Winter 2008, at 6 (describing storm damage in an Illinois cemetery).

281. *See generally Sisters of Destruction*, *supra* note 19.

282. *See, e.g., Family Shocked By Cemetery Destruction*, *supra* note 255; *Repair Process Begins*, *supra* note 255.

283. La. Exec. Order No. BJ 2008-102.

284. That said, the Louisiana Legislature did charge the LCB with the duty of developing recommendations for minimizing such damage in the future in the wake of Hurricanes Katrina and Rita. S. Con. Res. 60, 2006 Leg., Reg. Sess. (La. 2006). A report in response to this charge was completed by the LCB in 2007 and is available online from the LCB's Web site. Although, if any of the recommendations are implemented, storm damage may be minimized in the future for new interments, it is unlikely that these recommendations will help in minimizing damage to existing interments.

285. *See generally Sisters of Destruction*, *supra* note 19.

286. *See, e.g., Anser Analytic Services, Inc., LOUISIANA FAMILY ASSISTANCE CENTER CEMETERY REINTERMENT ASSESSMENT*, 4 (ANSER 2006) (noting that, because the Stafford Act does not contain language to deal with cemetery reinterment, such matters have "been dealt with by *analogy* to the rules, policies and procedures applicable to debris removal." *Id.* (emphasis

For this reason, cemeteries must be considered in the broader context of debris for the purposes of understanding what the law requires and will allow in the wake of a natural disaster.

1. THE STAFFORD ACT

The Robert T. Stafford Act (the Stafford Act), originally enacted as the Disaster Relief Act of 1974,²⁸⁷ grants FEMA broad authority to assist local governments with debris removal.²⁸⁸ The primary provision of the Stafford Act that FEMA trots out for disaster-related debris matters is Section 403(A)(2).²⁸⁹ This provision allows the President to authorize grants to “any state or local government for the purpose of removing debris and wreckage resulting from a major disaster from publicly or privately owned lands and waters.”²⁹⁰ At first blush, this provision appears to be a godsend for local governments that are inundated with debris and debt—not to mention destroyed cemeteries—following a disaster. As can be seen *infra*, the same picture emerges from the regulations promulgated pursuant to Stafford Act authority. However, as FEMA makes clear in its internal rules and publications, the facially simple process for securing certain types of debris removal reimbursement grants, especially for debris removed from private property, is not simple in reality. This reality becomes extremely important for cemeteries, as many are located on private property. The actual application of the law and regulations becomes convoluted as it works its way through FEMA’s process. This makes navigation of the specific requirements, ensuring that reimbursement does occur, difficult. However, it is essential for embattled local governments to understand these provisions, in order to assure that they can afford to undertake even minimal restoration projects within cemeteries.

2. FEMA RULES AND REGULATIONS

The regulations that control reimbursement for debris removal from FEMA are found at 44 CFR 206.224.²⁹¹ Part (a) of this Section reads:

Upon determination that debris removal is in the public interest, the Regional Administrator may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and

in original)).

287. Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974). The name was changed to the Stafford Act by Pub. L. No. 100-707, 102 Stat. 4689 (1988).

288. Pub. L. No. 93-288, § 403 (codified as 42 U.S.C. § 5173 (2000)).

289. § 5173(a)(2).

290. *Id.*

291. See FEMA, RECOVERY DIVISION POLICY NUMBER 9523.13 at ¶ 7(A) (2007) [hereinafter RECOVERY DIVISION POLICY] (on file with authors).

waters.²⁹²

Although this portion of the regulation largely parrots the debris removal provisions of the Stafford Act, it does not go on to detail what is meant by “public interest.” This term is explicated in 44 CFR 206.224(a)(1-4), thus:

Such removal is in the public interest when it is necessary to:

- 1) Eliminate immediate threats to life, public health, and safety; or
- 2) Eliminate immediate threats of significant damage to improved public or private property; or
- 3) Ensure economic recovery of the affected community to the benefit of the community-at-large; or
- 4) Mitigate the risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired through a FEMA hazard mitigation program to uses compatible with open space, recreation, or wetlands management practices.²⁹³

It would be difficult to argue that debris removal from cemeteries is not activity aimed at ensuring the health, safety, and welfare of the public. Read as a whole, this portion of the regulation seems to set in place a rather straightforward process to allow for reimbursement for debris removal. FEMA has somewhat complicated this easy read with 44 CFR 206.224(b), the next part of the regulation. This provision singles out debris removal from private property despite the fact that this type of debris appears to be covered in 44 CFR 206.224(a). Part (b) states that:

When it is in the public interest for an eligible applicant to remove debris from private property in urban, suburban and rural areas, including large lots, clearance of the living, recreational and working area is eligible except those areas used for crops and livestock and unused areas.²⁹⁴

Although it does not seem to imply any different approach from the treatment of public property, this singling out of private property does indicate that FEMA intends to treat private property differently from public property. In addition to this oddity, the “may provide” language in 44 CFR 206.224(a) gives regional FEMA directors broad discretion to condition the

292. 44 C.F.R. § 206.224(a) (2009).

293. 44 C.F.R. § 206.224(a) (2009).

294. *Id.* § 206.224(b).

award of reimbursement funds for local governments, complicating the cleanup process by ensuring that no cleanup will follow the exact same rules for each disaster. As a practical matter, even though the regional directors have latitude to vary, the requirements are often the same.

Pending approval by a regional director, cleanup on public property is easily reimbursable. Generally, this should be broadly approved, with reimbursement proceeding according to a fixed schedule at the outset of cleanup operations, allowing for post-haste debris removal from public roads and waterways, among other things.²⁹⁵ Thus, although local governments should not rely on history to assure them that they will be reimbursed for expenditures for cleanup on public property (due to the broad discretion granted to the regional directors to provide such assistance), there is a reasonable expectation that, pursuant to a declared emergency, such reimbursement will be authorized by FEMA.²⁹⁶ Thus, for cleanup in public cemeteries, there is little risk to local governments' expenditure of funds.

The same rule does not apply for debris removal from private property. Generally, FEMA requires private property owners to utilize their own resources to cleanup their property.²⁹⁷ The assumption behind this approach is that, unlike local governments who might be self-insured or whose operation is necessary for the continued function of an area, damage to private property is typically insured, and its rapid cleanup is not always necessary to ensure the economic and social viability of an area.²⁹⁸ Basically, FEMA does not want to pay if someone else will. However, FEMA does contemplate that local governments may, under extreme circumstances, have to pay for (and thus will need reimbursement for) the cleanup of certain private property. FEMA recognizes this possibility thus:

If debris on private business and residential property is so widespread that public health, safety, or the economic recovery of the community is threatened, the actual removal of debris from the private property may be eligible Debris removal from private property shall not

295. See FEMA, FEMA-322: PUBLIC ASSISTANCE GUIDE 39-45 (1999) [hereinafter PUBLIC ASSISTANCE GUIDE].

296. Abbott also cautions that municipalities should wait for FEMA clearance for debris removal to ensure that funds are available. Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues*, 37 URB. LAW. 467, 482-83 (2005).

297. PUBLIC ASSISTANCE GUIDE, *supra* note 295 at 46.

298. *Id.* An example of private property debris removal that would not be essential for the recovery process of a community to proceed would be a few fallen tree limbs in the yards of private residences. Such debris may be obnoxious to the landowners, but its removal is by no means essential to the function of society.

take place until the State or local government has agreed in writing to indemnify FEMA from a claim arising from such removal and obtained unconditional authorization to remove the debris from private property.²⁹⁹

So, what then is the problem? Why is it so complicated to initiate cleanup operations on private property (including cemeteries)? The answer to this question lies in the policy statements FEMA issued following a disaster, which set forth the reimbursement requirements for FEMA approval when conducting debris operations on private property.³⁰⁰ Part of the boilerplate language of these agreements requires that all local laws must be complied with in the execution of debris cleanup. The punishment for noncompliance is that FEMA will not reimburse the local governments their share of the cleanup expenses.³⁰¹

Such a reality can be a deal-breaker for local governments that seldom have the wherewithal to cover the full expenses of debris removal. Thus, in order to secure reimbursement funding, all local laws, in addition to state and federal laws, must be complied with.

What is meant by compliance with local laws? Generally, this means that any local or state laws which set forth the requirements for handling cemetery property and human remains must be obeyed.³⁰² In times of emergency, these requirements can be burdensome, if not impossible, to comply with and are difficult to navigate with the precision and expediency necessary to return life to a state of normalcy. Additionally, the cost of following state statutes or local ordinances applicable to cemeteries and human remains is often unduly expensive.

Even when all the pertinent laws have been complied with,³⁰³ FEMA reimbursement for services provided by local governments for cemetery-related work is by no means absolute or comprehensive. Admittedly, FEMA does provide for some amount of identification of disinterred human

299. *Id.*

300. See RECOVERY DIVISION POLICY, *supra* note 289, at ¶ 7(B). This document notes that local laws must be complied with in order for approval to be granted. *Id.* It also notes that the affected states' attorneys general must prepare a document that discusses and analyzes the constitutional and statutory authority for right-of-entry, demolition, and debris removal on private property in the event that the local and state laws cannot be complied with due to extenuating circumstances. *Id.*

301. See PUBLIC ASSISTANCE GUIDE, *supra* note 295, at 90 (noting that "FEMA may be required to deobligate funds after the initiation of a project" for failure to comply with certain laws).

302. See generally RECOVERY DIVISION POLICY, *supra* note 291.

303. In this situation, compliance with the applicable laws would mean compliance with all of the federal and State cemetery and human remains laws discussed in this article.

remains, but not much.³⁰⁴ It is apparent, though, that the FEMA's classification of remains as debris in a Sapir-Whorfian manner is pervasive.³⁰⁵ The semantics of this classification appear to give FEMA the perceived authority to treat these deceased human beings as nothing more than junk, like discarded refrigerators. The practical effect is that remains are subjected to minimal identification analysis and then pushed off to the local governments from whence they came for handling. No funding is provided for DNA analysis, intensive forensic anthropological analysis, or reburial in anything besides public cemeteries (regardless of the cemetery of origin).³⁰⁶ This reburial problem becomes acute when one realizes that there are few true "public cemeteries" and that many of the abandoned cemeteries damaged by natural disasters would actually be classified by FEMA as "private cemeteries." Thus, although human remains may be found miles from where they were once interred, FEMA will not cover the costs of returning them to their place of origin if that place of origin could be classified a "private cemetery."

One possible method of dealing with the FEMA-related "public cemetery" reburial problem, would be for Louisiana to statutorily redefine "public cemeteries."³⁰⁷ We propose the following language to accomplish

304. FEMA, HURRICANES KATRINA AND RITA, FEMA-DR-1603/1607-LA Information Sheet #007, at 2 (2006), available at [http://team.pakatrinarita.com/Information%20Sheets/Info%20Sheet%202007%20Cemeteries%20v3%2003%2027%2006%20\(2\).pdf](http://team.pakatrinarita.com/Information%20Sheets/Info%20Sheet%202007%20Cemeteries%20v3%2003%2027%2006%20(2).pdf) [hereinafter Information Sheet #007].

305. The theory referenced here is a concept in linguistic anthropology, known as the Sapir-Whorf Hypothesis, which basically holds that language constrains thought and action. STANLEY R. BARRETT, ANTHROPOLOGY: A STUDENT'S GUIDE TO THEORY AND METHOD 20 (1997). The theory was based on Benjamin Lee Whorf's observations of workers carelessly handling fuel drums labeled as "empty," when, in fact, they were anything but empty. The workers were lured into a false sense of safety by the "empty" label on the drums when, in fact, the drums contained highly explosive fumes that were much more dangerous than the liquid fuel that made up their original contents. In this situation, language (i.e., "empty") directed the workers to act a certain way towards the drums. Benjamin Lee Whorf, *The Relation of Habitual Thought and Behavior to Language*, in LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF 135 (John B. Carroll ed., 1997). Similarly, at FEMA, because human remains are labeled as debris, they are treated with about as much respect. This helps to explain the attitude that lets hundreds of unidentified human remains that were disinterred during Hurricanes Katrina and Rita sit in warehouses with little or no effort to return them to rest. Why bother? It's just debris.

306. See generally Information Sheet #007, *supra* note 304.

307. Such a reclassification is not without support in the jurisprudence. In *In Re Provident General Corp. v. AMI, Inc.*, 33 B.R. 241, 244 (Bankr. W.D. La. 1983), Judge Bernard found that a privately owned cemetery was nonetheless properly classified as a public cemetery due to its openness and service to the public and the lack of restrictions (save paying interment fees and purchasing rights to a plot) for interring people therein. *Id.*; cf. La. Atty. Gen. Op. No. 90-630 (Jan. 15, 1991) (defining the term "public cemetery" narrowly). This narrow definition seems to be outdated and inconsistent with the jurisprudence. That said, it was likely not the intent of the attorney general's office to address the issues raised herein related to disasters in this opinion.

this goal.

“Public cemetery” means a cemetery owned and operated by a political subdivision. The term “public cemetery” also includes abandoned private cemeteries for which a political subdivision has assumed legal, operational, and maintenance responsibility, whether explicitly or implicitly. The term “public cemetery” also includes any privately owned cemetery that is open to the public for the purposes of interment subject only to their ability to pay the fees of burial and other necessary expenses.

The determining factor for the classification of a cemetery as “public” or “private” for the purposes of Stafford Act compliance is based on the cemetery’s “use” rather than its “ownership.” A cemetery can be privately owned but still be classified as a “public cemetery” if it consists of burial plots or sites that are or were sold to the public without restriction other than costs.

The functional significance of this definition, which is supported by some jurisprudence,³⁰⁸ is that all cemeteries that have open burials (i.e., anyone from the public who can pay can be buried there) will be considered “public” whether publicly or privately owned. It is hoped, though it has not yet been tested, that this semantic difference will allow FEMA to allocate funding for reburial even in privately-owned cemeteries.

There is no clear answer to the problem of FEMA’s refusal to provide for or to conduct adequate identification analyses. Legislative action is needed on a federal level in this respect. Aside from a change to FEMA’s operating procedure and regulations forced by legislative action, there is little hope for a change in this policy.

3. A NOTE ON STATE LAW ISSUES RELATED TO CEMETERY DESTRUCTION FROM NATURAL DISASTERS

As noted, clear prohibitions exist against the use of public things (including manpower) to benefit private property without appropriate compensation to the relevant public body.³⁰⁹ Thus, debris removal and restoration activities using public funds or services in cemeteries on private property is generally restricted by state law.³¹⁰

Thus, the opinion may not be completely incorrect.

308. *In re Provident General Corp.*, 33 B.R. 241, 244 (Bankr. W.D. La. 1983).

309. LA. CONST. art. VII, § 14.

310. La. Att’y Gen. Op. No. 05-0360 (Sept. 22, 2005); La. Att’y Gen. Op. No. 05-0360-A (Sept. 29, 2005).

The way around this problem for relieving cemeteries of the debris and damage caused by natural disasters is narrow. As long as debris removal from private cemeteries and necessary repairs occurs during a declared state of emergency, and further when the debris located on private property constitutes an “immediate threat” to public health and safety, such removal is validly classified as serving a necessary public purpose to which such prohibitions do not apply.³¹¹

E. DEALING WITH PEOPLE THAT UNINTENTIONALLY DESTROY OR DAMAGE CEMETERIES

Although much of this Article has addressed damage to cemeteries due to abandonment, neglect, vandalism, and even natural disasters, these are not the only threats to these historic resources. Recent events have demonstrated that well-intentioned but improperly executed restoration efforts can be equally destructive to the other forces noted above. Examples of this destruction include recent attempts to repair deterioration and vandalism damage in the Odd Fellows Rest cemetery in New Orleans³¹² and recent attempts to repair deteriorated tombs in the Mt. Bethel Baptist Church Cemetery in Carville, Louisiana.³¹³

At the Odd Fellows Rest cemetery, cleanup workers were using pressure washers to remove grime from 200-300-year-old markers and monuments.³¹⁴ This practice is unacceptable, as it destroys these historic artifacts and the information contained on them.³¹⁵ The situation at Mt. Bethel Cemetery was even worse. In this cemetery, “restoration” work was accomplished by using a backhoe to tear down derelict above-ground tombs.³¹⁶ The bricks from two tombs were piled in the corner of the cemetery and cement slabs were put in their place until news reports caused the workers to change their practices.³¹⁷ Subsequent archaeological investigations of the rubble pile identified more than 100 fragments of

311. La. Att’y Gen. Op. No. 05-0373 (Oct. 20, 2005).

312. See Bill Capo, *Tombs Were Open, Bodies Visible At Canal Street Cemetery* (WWL; aired Apr. 28, 2009), <http://www.wwltv.com/topstories/stories/wwl042709cboddfellows.119bf0a7b.html>.

313. See Tyana Williams, *A Man Trying to Fix a Cemetery that Belongs to Mount Bethel Baptist Church* (WAFB; aired May 1, 2009), <http://www.wafb.com> [hereinafter *Man Trying to Fix a Cemetery*].

314. See Bill Capo, *Family Cleans Up Damaged Graveyard Where Tombs Were Broken Open* (WWL; aired May 12, 2009), <http://www.wwltv.com/topstories/stories/wwl051209cboddfellows.1dcb41ad.html>.

315. TOMB IT MAY CONCERN, *supra* note 10, at 44.

316. See generally *Man Trying to Fix a Cemetery*, *supra* note 313.

317. *Id.*

human bone as well as coffin parts and other artifacts.³¹⁸ The other “restorations” were accomplished by encasing entire above-ground tombs in concrete. Obvious Title 8 violations aside, these actions in Mt. Bethel Cemetery have destroyed or obscured all historically useful information from the graves and have caused substantial distress for the descendants of those interred in the disturbed graves.

These recent problems, mere snapshots of the problems statewide, have identified another problem related to cemetery preservation in Louisiana (and probably nationwide): there is a need for training standards for those who seek repair, renovation, or restoration work in Louisiana’s cemeteries. Based upon this need, we believe that legislation should set mandatory minimum training and certification standards. In this regard, we propose the following language as a possible statute to be enacted by the Louisiana Legislature:

Title 8

§ 79. Certification program for work in cemeteries.

(A) Legislative purpose and findings. The Legislature hereby finds that well-intentioned, but poorly-executed repair, renovation, and restoration work done in Louisiana’s cemeteries often does more harm than good to the historic integrity of these sites, and in some cases, may even rise to the level of desecration of graves and the human remains interred therein. Based upon these findings, it is necessary to create a minimum standards certification program for all persons that desire to undertake repair, renovation, and restoration work in Louisiana cemeteries.

(B) Exemptions. Exempted from this Section are the following persons and activities:

- (1) lawn maintenance;
- (2) garbage and trash removal and cleanup;
- (3) openings and closings undertaken under the direction of a licensed funeral director;
- (4) coroners or their deputies or assigns;
- (5) licensed funeral directors;
- (6) registered professional archaeologists; and

318. See generally Ryan M. Seidemann, ANALYSIS OF HUMAN REMAINS AND ARTIFACTS RECOVERED FROM CEMETERY REPAIRS AT MT. BETHEL BAPTIST CHURCH CEMETERY, CARVILLE, LOUISIANA (2009) (on file with authors).

(7) individuals possessing a graduate degree in historic preservation or an allied field of study.

(C) Course accreditation. To be approved as an acceptable certification program, course content must be jointly approved by the Louisiana Cemetery Board, the Louisiana Division of Archaeology, and the Louisiana Division of Historic Preservation.

(D) Course length and required topics. Each course must include, at a minimum, four credit hours, and must include at least the following topics: grave cleaning techniques, cemetery repair techniques, cemetery and historic preservation law, and basic identification of human remains. Additional credit hours and topics above the minimum requirements may be adopted pursuant to regulations jointly promulgated by the Louisiana Cemetery Board, the Louisiana Division of Archaeology, and the Louisiana Division of Historic Preservation. Course costs, dates, and locations, if administered by state entities, shall be set by the administrator of this program once per year in January. Nothing in this Section shall prohibit private entities from conducting such courses as long as the content is approved pursuant to Part C of this Section.

(E) Minimum requirements for certification. Parties seeking certification under this section must complete an initial certification course as detailed in Part D of this Section. Recertification by completion of a certification course as detailed in Part D of this Section must be undertaken once every five years following the applicant's initial certification.

(F) Administration. The certification program established by this Section shall be administered by the Louisiana Cemetery Board. The Attorney General shall represent the Louisiana Cemetery Board in any matter under this Section.

(G) Penalties. It shall be a misdemeanor for any person to conduct repair, renovation, or restoration work in a cemetery in the state without a valid, current certification under this Section. Each occurrence of repair, renovation, or restoration shall be a separate violation, and for each violation there shall be a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than thirty days nor more than six months, or both.

(H) Disaster exemption. Upon the declaration of a state of emergency under Title 29 of the Revised Statutes, the provisions of this Section may be suspended by executive order for the impacted area.

Although much of the above-proposed legislation is self-explanatory, a few points should be made. As to the exemptions, this section is intended to avoid unnecessary burdens to day-to-day cemetery functions or to those who, by education or experience, have the necessary knowledge of correct techniques for cemetery preservation. The reason for involving three state entities in the course accreditation process outlined in Part C is to ensure that the interests of the cemetery industry and the historic preservation community are adequately represented. The four required topics in Part D seem to be recurrent themes and have arisen in the problems noted above. However, with the realization that the group of experts identified in Part C may deem other topics necessary, the ability to add topics is left to their discretion. Naming the LCB as the program administrator is in keeping with that entity's role as an industry regulator that regularly issues certificates to cemeteries. Part G's penalties provision is merely an adoption of the penalties for operating a cemetery without a valid, current certificate of authority in La. R.S. § 8:74. Finally, the disaster exemption contained in Part H simply provides a relief valve for emergency work to be done in cemeteries, if necessary, to secure remains and other artifacts.

Although we do not set forth a certification fee for the course, we do recommend that the fee be kept as low as possible; it is not our aim to exclude anyone from performing cemetery repair, restoration, or renovation. Rather, it is simply our intention to ensure that those undertaking such work do so in a manner that is consistent with best practices.

V. SHORING UP PROTECTION

Although a combination of Louisiana and federal law provides some measure of protection for historic cemeteries, the protection provided is neither complete nor enough. As has been demonstrated, the continual gaps in existing protections create a constant threat to our cultural heritage.³¹⁹ Based upon the foregoing review, the major gaps in the legal protection of cemeteries in Louisiana are:

- (1) Lack of a special status of cemeteries under the NHPA;

319. Assuming that what we believe to be the incorrect interpretation of the "marked" versus "unmarked" burials distinction (discussed *supra*) is followed, this gap is larger than the gap that we believe exists under the correct interpretation. If the former (i.e., incorrect) interpretation is ever accepted by a court in this state, substantial legislation will be necessary to fill the gaps. In this regard, we believe that legislation along the lines of H.B. 1092 of 2008 would be appropriate. However, if, as we believe, the protections in H.B. 1092 already exist in the Unmarked Burials Act, such protections would be duplicative. That said, there will always be a need for funding to support preservation and protection efforts.

(2) Lack of funding available for historic cemetery preservation or restoration;

(3) The absence of historic preservation requirements in La. R.S. §§ 8:308, 8:903, and 8:903.1.

To summarize, the classification of such property in times of disaster and the proper documentation of historic graves when they are slated for alteration present other problems, as discussed at length above. Legislative proposals intended to remedy them have also been pressed. Accordingly, no further consideration is to be given these matters. The remaining proposals outlined below, however, propose remedies for the other enumerated problems.

The lack of special consideration for cemeteries in the NHPA could be remedied by a simple regulatory change. The National Park Service (NPS) has established, in 36 CFR 60.4, the four major criteria for National Register eligibility:

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.³²⁰

As King³²¹ notes, cemeteries can be shoehorned into one of these categories. However, due to the sacred nature of such places and the stores of historic and cultural information they contain, cemeteries should not be subjected to such shoehorning. Very simply, the NPS could add a fifth category to the National Register eligibility criteria, assuring some level of

320. 36 C.F.R. § 60.4 (2009).

321. CULTURAL RESOURCE LAWS & PRACTICE, *supra* note 30, at 81.

federal protection for such important spaces, which would not require inventive nominations in an attempt to squeeze important sites into protection from National Register protection. In this regard, we propose the following:

(e) that are the final resting places of members of a community.

One matter that the NPS would have to consider, should it elect to amend the National Register eligibility criteria, is cemeteries' dynamic nature. Unlike many historic structures listed on the National Register, which, once restored, are not subject to much alteration aside from maintenance and use,³²² many cemeteries are continuously in use.³²³ The simple reality that cemeteries continue to be used should not undermine the historic value of portions of those sites, nor should it be a reason to deny such sites protection. The NPS, in drafting regulations to amend the National Register eligibility criteria, must consider a means for permitting eligibility for currently operating cemeteries.³²⁴ Such regulations could simply exempt activities related to new burials from being NHPA violations and require adherence to conservation standards when any repair or modification must be made to the historic portions.

As noted above, the lack of funding to support cemetery restoration activities is, at best, hard to come by. As discussed, this obstacle appears to be the most significant impediment to these sites' protection. The following discussion considers potential remedies to this daunting issue.

In both 2007 and 2008, the Louisiana Legislature considered bills that would provide such funding.³²⁵ These bills did not succeed. We believe that a new version of the 2008 bill, which contains a specific funding source, should be reintroduced and reconsidered in light of the problems discussed herein. The funding source—the burial transit permit—does not constitute a significant burden on parties to a funeral such that it

322. See, e.g., *Probst v. City of New Orleans*, 337 So. 2d 1081, 1084-1085 (La. 1976) (commenting that, "building alteration and demolition [in the French Quarter] are prohibited without approval of the Vieux Carre Commission."). Such alteration restrictions are typical of structures on the National Register.

323. See Olsen, *supra* note 274, at 22.

324. An example of such a situation is Magnolia Cemetery in Baton Rouge, which was admitted to the National Register in 1985. DEPARTMENT OF THE INTERIOR, NATIONAL REGISTER OF HISTORIC PLACES, ANNUAL LISTING OF HISTORIC PROPERTIES, 51 F.R. 6626-01 (Feb. 25, 1986). The nomination form for this cemetery notes usage (and thus alterations to the cemetery's historic integrity) with just a few years of the nomination. See NATIONAL REGISTER OF HISTORIC PLACES, INVENTORY – NOMINATION FORM, MAGNOLIA CEMETERY, BATON ROUGE (on file with authors). Thus, there is at least some precedent for the NPS to allow for cemeteries to be listed on the National Register and also be operating cemeteries.

325. S.B. 302, 2007 Leg., Reg. Sess. (La. 2007); H.B. 1334, 2008 Leg., Reg. Sess. (La. 2008).

should be discounted as a viable source out of hand. Additional funding sources could be found in an increase in the death certificate costs or, perhaps more palatable, a fee attached to tourism activities, such as hotel/motel stays in Louisiana, as many historic cemeteries represent a significant tourist draw for the state.³²⁶ Accordingly, although the funding source should perhaps be revisited, we are of the belief that legislation similar to HB 1334 of 2008 should be seriously reconsidered and enacted.

There are two other potentially promising sources of funding to assist in cemetery preservation or restoration. One of these sources would be extending the tax incentives provided by DHP for the restoration and maintenance of historic structures to cemeteries.³²⁷ As has been noted above, such approaches have been successful in other conservation arenas.³²⁸ These tax incentives may provide a substantially attractive opportunity for operating cemeteries with historic components, because, as Mitford has aptly noted,³²⁹ many of these entities are, first and foremost, for-profit businesses for which tax breaks would be advantageous.³³⁰

One final funding proposal derives from New Jersey's Historic Cemeteries Act.³³¹ Under this law, local governments may provide funds for historic cemetery preservation and restoration. It is clear from this Act that the law is aimed at assisting in the protection of private historic cemeteries.³³² A similar law could be used in Louisiana to assist in necessary repairs where, in situations such as those cited from West Baton Rouge Parish, human remains are exposed or where the public's health, safety, or welfare are at risk due to cemeteries in disrepair. Due to the limited budgets of most local governments, such fund's uses should be narrowly tailored and primarily applied to situations such as those with exigent circumstances. In that regard, we proposed a provision for addition to Title 8 (which paraphrases NJ St. 40:10B-3):

8:907. Restoration and preservation of historic cemeteries.

The governing body of any [parish] or municipality may provide for

326. See generally FLORENCE, *supra* note 17; Bleiberg, *supra* note 17.

327. See LA. REV. STAT. ANN. § 47:4311 (2009).

328. See generally Seidemann & Susman, *supra* note 187.

329. See MITFORD, *supra* note 4, at 97-118.

330. See generally S. Julio Friedmann & Thomas Homer-Dixon, *Out of the Energy Box*, 83 FOREIGN AFFAIRS 72 (2004) (discussing how economic incentives are making environmentally sound business practices more attractive to for-profit businesses). See also, Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209 (1998) (same).

331. N.J. STAT. ANN. § 40:10B-1 (2009).

332. *Id.* § 40:10B-2.

the restoration, maintenance, and preservation of any historic cemetery located within its borders. As used in this [part,] “historic cemetery” means a [public or private cemetery, any portion of which is greater than fifty years old], in which not more than [20%] of the interments have been made in the past fifty years, and for which no funds are available for regular maintenance or preservation. [Such funds may only be allocated in order to secure, protect, and rebury exposed human remains or to protect the public’s health, safety, or welfare.]

We would also recommend that such legislation should provide for certain caps on expenditures, similar to the New Jersey law.³³³

One additional note with regard to such use of public funds: Should a law similar to that proposed above be enacted in Louisiana, it will have to be enacted pursuant to a constitutional amendment. Because La. Const. Art. VII, Sec. 14(A) would generally restrict the use of public funds as contemplated in the proposed law,³³⁴ an amendment to this constitutional provision exempting such uses from the general restrictions would be necessary. Although it sounds procedurally prohibitive, constitutional amendments are fairly common in Louisiana.³³⁵

Finally, we propose that those cemeteries not subject to the permitting provisions of the Unmarked Burials Act be brought up to the same historic preservation standards and requirements imposed by the Division pursuant to the Unmarked Burials Act. In other words, because the modifications that are allowed under La. R.S. §§ 8:308, 8:903, and 8:903.1 are not subject to being accomplished according to historically accurate standards, these minimal protections are not enough for the protection of our shared cultural heritage. In this regard, we propose that legislation be crafted, in conjunction with input from the cemetery industry and experts from the historic preservation, architecture, and archaeology fields, to provide for a permitting process for the alteration of grave spaces exceeding fifty years in age. Such a law should exclude such activities as cleaning of graves and matters related to the reopening of graves pursuant to family requests. Such permits and their requirements should be created

333. See, e.g., N.J. STAT. ANN. § 40:10B-3 (2009).

334. The relevant constitutional provision reads:

Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private. Except as otherwise provided in this Section, neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.

LA. CONST. art. VII, § 14(A).

335. See Melissa Lawrence, *Constitutional Revision by Amendment: A Louisiana Tradition*, 51 LA. L. REV. 849, 851 (1991).

by regulation by the representatives noted above.

VI. CONCLUSION

As has been demonstrated in this Article, there is substantial law in Louisiana that, when properly used and understood, can assist in historic cemetery protection, preservation, and restoration. That said, there are still substantial gaps in the law that must be filled in order to ensure the protection of these sacred cultural assets. With increasing threats to such sites, a serious consideration of means for legislative and regulatory gap filling is necessary, and the implementation of such new laws is now essential. Failure to act quickly and prudently could ensure that such resources are lost forever.