Final Vestiges of Existence: The Survival and Protection of Cemeteries as Landscapes of Grieving and Cultural Memory in Louisiana

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Final Vestiges of Existence: The Survival and Protection of Cemeteries as Landscapes of Grieving and Cultural Memory in Louisiana

A Dissertation

Submitted to the Graduate Faculty of the University of New Orleans in partial fulfillment of the requirements for the degree of

Doctor of Philosophy in Urban Studies Urban Anthropology

by

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DEDICATION

For Ericka, Elizabeth, and Michael.
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ABSTRACT

In many contexts, cemeteries are an afterthought, both in terms of their design and situation in the landscape as well as in terms of what to do when they are encountered during development or other activities. How these sites have been managed and treated, at least historically, often has been a function of who is buried in them. In such situations, considerations regarding the preservation or protection of marginalized peoples’ final resting places were often nonexistent and, consequently, these sites were violently erased from the landscape. Indeed, archaeological evidence has recently demonstrated substantial deviations in practice from de jure legal protections that often appear to occur along class and racial lines. Such acts of landscape structural violence in the New Orleans area are the subject of this dissertation. Through a review of archival sources, archaeological evidence, and legal mandates, including federal legislation like NAGPRA, this research examines the evolution of cemetery site protections in Louisiana over time, in part to track the ebbs and flows of de jure versus de facto cemetery protections as well as the causation for divergences of these categories. Recent cemetery protection laws can be effective tools for unmarked cemeteries, especially when coupled with ancient concepts of land use. However, these legal protections must be coupled with effective community involvement to correct the history of unequal treatment of cemeteries in the past.

KEYWORDS: cemetery, human remains, structural violence, NAGPRA, Louisiana law, mortuary archaeology
CHAPTER 1
INTRODUCTION

In 2010, the Louisiana Department of Justice (“LDOJ”) received frantic calls alleging that a white male had destroyed an African-American cemetery in Bossier Parish, Louisiana. Through subsequent cooperation with the Bossier Parish Sheriff’s Office, a suspect was brought in for questioning. During this questioning, Sidney Jetton told police that he wanted to own land that was near the productive Haynesville Shale natural gas play in north Louisiana. He had located some property that he figured no one would ever complain about if he acquired it through squatter’s rights: an abandoned African-American church. In the late 1990s, the church had burned down and the church’s congregation had shifted their location of worship elsewhere in the parish. According to the descendants, the cemetery located around the original church remained. Although Mr. Jetton denied the existence of the cemetery and claimed never to have seen grave markers when he was clearing the land, he did admit to bulldozing the entire area formerly occupied by the church (Fig. 1) and its environs in order to level the land for his future occupation.

If the neighbors and descendants were to be believed, all of the above-ground evidence of the cemetery, mostly tombstones, was wiped from its original location never to be found again. There is no evidence that the accused ever impacted subsurface burials during these efforts. However, the accused admitted to having some 300 dump truck loads of dirt deposited on the site to level the ground and to cover any existing surface obstructions.
When neighbors to the land contradicted Jetton’s statements to law enforcement about the cemetery and his knowledge of it, he threatened them against testifying. Although Jetton was arrested for threatening witnesses, the district attorney never brought charges.

During subsequent efforts by LDOJ to build a civil case under the Louisiana Unmarked Human Burial Sites Preservation Act, archaeological probing and coring revealed evidence of the presence of a burned structure on the property. This finding supported the oral history obtained from the descendant community, but the cemetery’s presence proved elusive. None of the archaeological testing, historical records research, or aerial photography could verify the cemetery’s existence on the property around the known burned structure. Nonetheless, oral testimony from the descendant community vividly reconstructed the presence of graves—
including even the names of many of those buried at the site—around the former church structure.

Ultimately, the State of Louisiana filed a civil action that resulted in the accused being evicted from the property. However, due to evidentiary shortcomings and procedural difficulties with the court, little else was able to be proven to the necessary legal standards. Moreover, the laws intended to prevent this sort of activity proved to still place burdens on the state and on the descendant community that were insurmountable to effectively accomplish any sort of restitution or restoration when presented in a litigious setting. This lack of restitution or restoration meant that the descendants could never be made whole in this matter. Their cemetery, though the bodies were sealed in place, had been erased from the landscape. Nothing short of a full archaeological excavation of the entire impacted area would ever be able to locate the covered graves, and no funding existed for this sort of work. Certainly the accused had no money to fund those excavations. Through discussions with the families and the descendants of those buried at this cemetery, the disparate treatment of marginalized peoples, in this case African-Americans, clearly underscored Mr. Jetton’s use of this location for his land acquisition plans—a disenfranchised group lacked the agency to oppose his actions and he thought that he could proceed without fear of recourse. The occurrence of such a situation in the recent past—during a time in which substantial legal protections ostensibly existed to stop such actions from occurring—was both surprising and disturbing. Though well intentioned, these laws fell far short of their intended purpose. Their purported purpose is to protect all peoples from having the graves of their loved ones destroyed by disproportionate treatment, by unknowing development, or by simple desecration.
Today the site is protected as an archaeological site and as a cemetery and its location is recorded for future protection. However, the only permanent memorialization that now exists for this cemetery is a minimal cenotaph (Fig. 2) to those who are buried at this site as recollected by the descendants.

This story is all too common—not just in Louisiana, but around the United States and likely the world. Since the close of this case, Louisiana legislators have enacted multiple additional laws, not necessarily as a result of the failures of this case, but simply to mitigate and avoid the possibility of such problems occurring again. The Jetton case illustrates historic (and to some extent modern) problems between the idea that cemeteries are spaces set apart from other landscape features in a de jure sense, but that those de jure aspirations are often inadequate to protect those sites. While cemetery site damage and destruction will always occur, the Jetton case is emblematic of a need to critically examine the existing protections for these sites to evaluate what is and what is not working to protect them.

Figure 2. Cenotaph at the location of the cemetery allegedly damaged by Mr. Jetton. Photograph by the author.
A. What is a Cemetery?

In order to fully appreciate the substance of this dissertation, understanding what constitutes a cemetery is crucial. Differing definitions of a cemetery exist both among various scholarly fields (e.g., Rugg 2000; cf., Nance 1999:41) and among various legal jurisdictions (e.g., La. R.S. 8:1(7); cf., Ala. St. § 27-17(A)-2(12)). On balance, Louisiana’s definition of “cemetery” is among the most inclusive legal definitions in the United States and is the one used in this dissertation. Louisiana defines, in La. R.S. 8(1):7, 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.

This expansive definition covers every permutation of land that may be used for the housing of human dead. Importantly, at least in Louisiana, a cemetery is not created under the law when the remains of modern disaster or crime victims are encountered on a piece of property. The cemetery provisions of Louisiana law contemplate the intentional interment, inurnment, or placement of human remains for the purposes of final disposition. Thus, for the purposes of this dissertation, and also for the purposes of ensuring that laws expansively protect human burial sites, the Louisiana law quoted above constitutes the operative definition of a cemetery.

As noted by Miller and Rivera (2006:334), “whether the bodies of the deceased are placed in the ground, within elaborate tombs, or simply in the presence of ancient or

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1 As is often the case with legislation, many United States jurisdictions simply copy others’ existing laws when enacting similar legislation. In this regard, Texas’ definition of “cemetery” is identical to Louisiana’s definition. Tx. Health & S. § 711.001(4). Admittedly, even Louisiana’s and Alabama’s definitions cited here, though distinct, are substantially similar. Contrarily, some states (e.g., Mississippi) provide no statutory definition for cemeteries.

2 See e.g., La. R.S. 8:1(2), which defines “burial” as “the placement of human remains in a grave” (emphasis added). The use of the term “placement” connotes an intentional act and not a disastrous or malicious cause. Moreover, the definition of “interment,” a key component of the definition of “cemetery,” which is “…the disposition of human remains by inurnment, scattering, entombment, or burial in a place used or intended to be used, and dedicated, for cemetery purposes” (La. R.S. 8:1(26)) is also exclusive of such actions as the discard of the remains of crime victims and the death situs of disaster victims.
contemporary monuments, their location holds symbolic meaning as well as practical historical meaning for the surrounding living community.” Accordingly, it is difficult to deny the unique nature of cemeteries (Foucault 1986; Sheppard-Simms 2016; Sloane 2018) and, because of their connections to the grieving process and the historical nature of a particular place (Silverman 2002), impacts to these spaces that erase them from the landscape clearly have an impact on the descendant community.

B. Cemeteries Under the Law

Throughout history, various cultures have afforded a special status for the resting places of the dead and have mandated the protection of such sites through the law, and Louisiana is no different. However, archaeological evidence has recently demonstrated substantial deviations in practice (de facto) from these legal ideals (de jure) that appear to occur along class and racial lines (Godzinski et al. 2008; Hahn and McCarthy 2012; Hahn et al. 2017; Smith and Stone 2014).

Moreover, cemeteries, both in urban and rural settings, are constantly under threat of damage and destruction from multiple causes (Seidemann 2013; Joiner and Seidemann 2019a, 2019b; Lemke 2020). Individual impacts such as desecration of graves occur regularly and they are often hurtful to the living family of those whose graves are impacted (Seidemann and Halling 2019). However, beyond anecdotal evidence of individual desecration events, little understanding exists of the dynamics of what causes and who authorizes such destruction that results in an entire cemetery’s erasure from the landscape. In many cases, such complete erasure of cemeteries is an institutionally sanctioned occurrence. Occasionally such erasures are not just institutionally sanctioned or a result of institutional ambivalence, but rather are overt efforts to attack memory and culture (Amanat 2012; Dasgupta 2015:194-195). New Orleans presents a
unique laboratory for analyzing cemetery destruction, as recent archaeological excavations in the city have revealed both sanctioned and unsanctioned examples of cemetery destruction.

Recent years have seen sweeping changes to the way in which human remains and burial places are treated under the law, at least in the United States. No debate exists that, historically, human remains and cemetery sites, especially those of the underprivileged, were relegated to the status of curiosities (human remains) (Harrison 2014; Murray and Brucker 1982) and nuisances (cemeteries) (Johnson 2006). The curiosity aspect of human remains later, in some cases, morphed, in the mid- to late nineteenth century, into scientific inquiry that formed the basis of the area of study known as physical anthropology. Nonetheless, many such remains continued (as they do today) to be mere curios for the public (Jarus 2020). The cemeteries, especially in urban areas, began as nuisances because, as they filled and were poorly tended, they often stank and leaked offensive fumes into their environs (Ariès 1981; Johnson 2006; Legacey 2019). Though cemeteries in rural areas may have been less aesthetically offensive, they often eventually stood in the way of some development or other, thus becoming planning and development problems for future generations (Kay 1998; Klaufus 2014).

Over the course of this period, the law, at least in its written form, recognized that the mortal remains of human beings should not be reduced to property and commodified (e.g., Yiannopolous 1992). Moreover, during the twentieth century, local and state jurisdictions increasingly recognized cemeteries as sacred spaces (Sloane 2018; Vanderstraeten 2014) to be accorded unique treatment that ostensibly protected such sites from most future reuse or destruction (Seidemann 2018a; 2018b). Historical accounts from around Europe and the United States demonstrate that, though such protective laws existed, they were seldom enforced, as human remains were regularly sold and possessed (e.g., Quigley 2001) and as the cemeteries that
contained those remains were converted to myriad other uses (e.g., Curl 2001; Nance 1999), either situated directly atop the burials or with the remains removed as refuse.

Archaeological research has confirmed many such instances of cemetery damage or desecration and an emerging area of inquiry—bioarchaeological structural violence research—has also begun to elucidate acts of postmortem treatment of human remains that, in many cases, are more severe on the remains of various underprivileged groups (e.g., Klaus 2013; Nystrom 2014; 2017). As set forth below, the theory of structural violence (Galtung 1969), as it has been adapted to the landscapes of death (Seidemann and Halling 2019) and the dead themselves (Klaus 2013; Nystrom 2014; 2017), helps scholars to understand and analyze the systemic and institutionalized disproportionate treatment of certain cemeteries. Although exceptions exist today (Graham and Huffer 2020; Halling and Seidemann 2016; Huffer and Chappell 2014; Huffer and Graham 2018; Huffer et al. 2019; Huxley and Finnegan 2004; Jarus 2020; Seidemann, et al. 2009), human remains, at least in the United States, are being accorded the treatment that the law intended: they are not subject to ownership without the express consent of the deceased.

Taking a cue from Claude Lévi-Strauss’ (1968:17) observation in his inaugural lecture (1958) as the Chair of Social Anthropology, Collège de France, that “anthropology can do nothing useful without collaborating closely with [other] social sciences,” this dissertation examines the law, history, archaeology, and urban studies to trace and examine recent changes in advocacy, policy, culture, and the law regarding how the dead and the spaces of the dead are treated in the United States and in Louisiana particularly. As part of this study, how cemeteries are treated during the land use and planning process is also considered to provide another perspective on whether changes in the living’s interactions with the dead in recent history—or at
least since the enactment of substantial laws to force behavioral changes in these interactions—have any impact on such treatment.

C. Are Some Cemeteries Treated Differently From Others?

Recent scholarship has examined differential treatment of peoples and their remains as an indicator of institutionalized oppression against disenfranchised groups (Farmer 2004; Nystrom 2014). The experience recounted above certainly raises the question (and seemingly provides the answer in the affirmative) of whether the unnamed cemetery allegedly destroyed by Mr. Jetton occurred because of the identity of those interred therein and their descendants (i.e., disenfranchised African-Americans) and because of Mr. Jetton’s own racial identity as a white man. In other words, was Mr. Jetton able to destroy this cemetery because the people interred therein were disempowered and the cultural structure of the American South instructs that many of the empowered class can continue to oppress African-Americans through the control of their property and their sacred spaces?

In Chapter 2, this question of disproportionate treatment of the dead and their burial spaces is examined through the growing literature on structural violence. It is important to note that not all disproportionate treatment occurs along ethnic or racial lines. Ample literature that extends beyond the scope of this dissertation has considered such disproportionate treatment from racial/ethnic perspectives (e.g., Gosden 2006), gendered perspectives (e.g., Stone 2020; Zuckerman 2021), class and poverty perspectives (e.g., Muller et al. 2020), among others. Indeed, as is set forth in Chapter 2, much of the disproportionate treatment in Louisiana’s cemeteries reviewed here is attributable to class and socioeconomic status rather than to race or ethnicity. First introduced in the social science literature in the 1960s, structural violence is a theory that states that certain people are oppressed through existing cultural and institutional
structures (Galtung 1969; Gonzáles-Tennant 2018; Tremblay and Reedy 2020:3). As is discussed more fully in Chapter 2, this notion of oppression at the institutional level has been expanded in recent years to examine and to conclude that ingrained cultural prejudices have led to the marginalization of oppressed people not just in life (Farmer 2004), but also in death (Nystrom 2014; 2017). Part of this expansion of structural violence inquiries has more recently been extended into the cemetery, with examinations of whether this oppression extends to the landscapes of death (Seidemann and Halling 2019). Chapter 2 situates several Louisiana cemeteries within this theoretical inquiry for the purpose of examining where such violence occurs and to establish a basis to analyze, in subsequent chapters, whether legislation can and has been used to combat this violence both in Louisiana and elsewhere.

D. The Law on the Books: Legislative Attempts to Protect the Spaces of the Dead

Chapter 3 contains a review and a critical examination of the de jure protections of the dead and the spaces of the dead in the law and how they have been used or unused in Louisiana. The review and analysis of Chapter 3 examines both federal and Louisiana efforts in the recent past to protect the dead and cemeteries. Included in this examination is a historical analysis of the development of those laws as instructive of their use and utility to protect such sites now and in the future. Necessarily encompassed within this review and analysis is the genesis of modern human remains and cemetery protection laws with the passage of the Native American Graves Protection and Repatriation Act (“NAGPRA”) by the United States Congress in 1990. The decades-long struggle to pass this legislation, which arose in part from a growing sense of self-empowerment among Indigenous Americans during the Civil Rights Movement (Bray 2001; Stutz 2013) as well as from the shameful treatment of these peoples—both living and dead—by early anthropologists in their efforts to better understand New World prehistory (Thomas 2000),
began a movement at the state level to provide, at least in theory, for greater protection of such people and places (Seidemann 2010). These local efforts represent a patchwork of mostly restrictive and penal laws around the United States that, like their federal counterpart, have considerable room for improvement and leave substantial gaps in the protection of the dead and their places of rest. Indeed, the late adoption of such laws by some states (e.g., Texas) have left many cemetery sites arguably underprotected (Seidemann 2012), a topic returned to in Chapter 6. Conversely, as reviewed in Chapter 2, states like Louisiana have been proactive in legislating for human remains and cemetery site protection (Seidemann 2014a; Seidemann and Halling 2020), though, as the Jetton matter reviewed above demonstrates, such efforts have not always been successful in providing meaningful de facto site protections.

E. Older Laws as Untapped Cemetery Site Protections

In addition to the laws of relatively recent vintage (i.e., post-NAGPRA) that have been created to protect human remains and cemetery sites from damage and destruction, certain restrictive covenants on land containing human burials that have existed in Western legal traditions for centuries are emerging as strong and largely unused cemetery site protections. Chapter 4 examines these laws—commonly referred to as cemetery dedication laws—with specific focus on the evolution and use of these laws in Louisiana.

An amicus curiae brief submitted to the United States Supreme Court in 2018 (Marsh and Seidemann 2018) displayed the utility of these laws in other parts of the United States. In the matter of Knick v. Township of Scott, Pennsylvania, 17-647, 139 S.Ct. 2162 (2019), a private landowner challenged as unconstitutional an ordinance that authorized regulatory examinations of private property to determine the location of cemeteries. In this case, the plaintiff argued that such governmental intrusions onto private property are prohibited by the Fourth Amendment to
the United States Constitution’s prohibition on warrantless search and seizure. Specifically in this case, Ms. Knick alleged that an “ancient burial ground” existed on the plaintiff’s property (Seidemann 2018b). Pursuant to the above-noted ordinance, a county official entered Ms. Knick’s property without permission and without a warrant to verify the existence of the alleged cemetery. Both the federal court for the Middle District of Pennsylvania and the federal Third Circuit Court of Appeals found no constitutional violation by the challenged ordinance either as a warrantless search or as a taking of private property (Seidemann 2018b). The taking in this case allegedly occurred when a cemetery was found on Ms. Knick’s land and it was recorded by the county. Ms. Knick alleged that such a public recordation devalued her land and represented a violation of her Fifth Amendment right to protection from governmental takings of private property. Ms. Knick sought and was granted review of a part of her case by the United States Supreme Court.

In an amicus brief to the United States Supreme Court in support of the defendant in the Knick matter, the Township of Scott, Pennsylvania, Marsh and Seidemann (2018) argued, among other things, for the application of the cemetery dedication laws to the property that was the subject of the lawsuit. Such an outcome would have resulted in a finding by the Supreme Court that, because Ms. Knick’s land had been burdened with restrictions due to its use as a cemetery long before she or her ancestors-in-title acquired any vested constitutional rights in the land, the challenged classification of the property as a cemetery could not constitute a taking of private property under the United States Constitution. Unfortunately, the Supreme Court, departing from the rulings of the lower courts, refused to reach the merits of this case regarding the constitutional implications of classifying land as a cemetery and, instead, remanded the matter to the Pennsylvania district court for additional litigation on largely procedural issues.
The *Knick* case is relevant to cemetery site protection, because the case illustrates the precariousness of modern protective laws such as NAGPRA. If these laws’ application to private property can be found to be a compensable taking under the United States Constitution, then the cost of cemetery site protection increases exponentially. Not only will actual costs of documentation, repair, and preservation be a part of the management of these spaces of the dead, but private landowners often will have to be compensated for the reduction in the merchantable value of their land as a result of the presence of a cemetery. With the use of the dedication provisions reviewed in Chapter 4, such untenable costs are eliminated because the ancient nature of such restrictions as predating the formation of the United States and its Constitution means that any property devaluation that occurs as a result of a cemetery’s presence on a tract of land is not a governmental taking, but rather is an incident of land ownership (Seidemann 2018b).

Also woven into Chapter 4 is a review of the archaeological and urban studies literature related to cemeteries and their significance in both of those fields of inquiry. This review rounds out the consideration of existing protections for cemetery sites and situates those protections within a modern literature base in archaeology as a possible driver for enhanced protections. In other words, the evolution of archaeological practice and theory—from a largely colonialist and destructive to a more multivocal and preservationist milieu—appears, in some ways, to parallel and perhaps even to influence or inform the need for such site protections. Within the urban studies literature, Chapter 4 contains an analysis of a relatively recent awakening to the awareness of the significance of and limitations related to cemeteries, especially in a planning context.

Importantly, cemetery dedication laws would not have protected the site allegedly destroyed by Mr. Jetton. These laws, like so many other environmental and historic preservation

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3 Kay (1998) notes the devaluation problems often associated with having a cemetery on property.
laws, are intended to act proactively as a deterrent to site destruction (e.g., Callahan 1993). In Mr. Jetton’s case, only after he had allegedly bulldozed the grave markers was law enforcement notified of the threats to that site. The dedication laws are not penal in nature and they do not provide for reconstruction, rehabilitation, or restitution. They are intended to act as deterrent to such action as Mr. Jetton’s alleged destruction and, because no historical evidence existed other than oral tradition regarding the presence of a cemetery on the site damaged by Mr. Jetton, the dedication laws failed to help build a case against him.

F. New Orleans’ and Other Experiences with Cemetery Impacts

Chapter 5 is a review and analysis informed by archival and archaeological field research on several Louisiana cemetery sites to assess the de facto application of these laws. This chapter begins with a review of the Louisiana Supreme Court records of historic cases regarding an oil and gas company’s destruction of a cemetery in Acadia Parish (the Humphreys case), as well as cases preparing for the removal of remains from a Jewish and a Protestant cemetery in New Orleans (the Touro Synagogue and Christ Church cases, respectively). These records provide insight into both the psychological and physical toll taken on descendants when their loved ones graves are destroyed (Humphreys) and on the interaction of cemetery spaces with urban planning (Touro Synagogue and Christ Church). These records are particularly insightful for the purposes of examining whether existing laws aimed at the contemporary protection of cemeteries were actually used for their stated purpose and to what extent the descendant community exercised any agency over the decisions to essentially decommission their cemeteries.

Chapter 5 also includes a review of prior and original archaeological research into the efficacy of de jure cemetery protections. Archaeological field research since the 1980s has provided a unique perspective into the treatment of the spaces of the dead and, as with the
archival sources, whether and how the laws intended to protect those sites actually functioned. For this review, archaeological work undertaken in the wake of Hurricane Katrina on the cemetery that was the subject of the *Touro Synagogue* case indicates that the authorities followed *de jure* protections only minimally, at best. Additional evidence for this conclusion comes from a review of the archaeological reconnaissance at the site of the *Christ Church* case’s cemetery and more substantial excavations at the sites of the Charity Hospital Cemetery No. 2 and Historic Highland Cemetery in Baton Rouge. Rounding out this chapter is an examination of the *de facto* realities of cemetery protection (or the lack thereof, as the case may be) from an archaeological perspective, considering what information and assistance to the combatting of structural violence at and the preservation of these sites modern archaeology can bring to bear.

G. Cemetery Site Protection: Lessons Learned in Louisiana and Their Utility for Other Locales

As is reviewed and analyzed in this dissertation, Louisiana has substantially legislated on topics regarding human remains and cemetery sites since the passage of NAGPRA in 1990. Chapter 6 examines the applicability of lessons learned in Louisiana to sites in other states. Particularly, and especially because Texas was late to the game in its enactment of NAGPRA-like legislation (Seidemann 2012), the North Dallas Freedman’s Town Cemetery site and its treatment is reviewed through the lens of Louisiana’s laws in an effort to determine whether such comprehensive protections as exist in Louisiana may have avoided the well-documented disproportionate treatment of this African-American burial site (Davidson 2007; Lemke 2020) compared to the then-extant Texas laws. Comparison is also made to the more well-known African Burial Ground site in New York City for the same purpose.

Chapter 6 also contains a review of emerging legislation, both in Louisiana and at the federal level, to determine the utility of such laws to the protection of cemetery sites. Also
examined in Chapter 6 is a discussion of the reality that, though expansive, Louisiana’s laws are not comprehensive protections for cemetery sites against intentional or unintentional damage and destruction. Among the issues reviewed is whether increased agency is possible for marginalized groups in dialogues regarding cemetery protection.

Also, somewhat contrary to general archaeological site preservation notions, Chapter 6 contains a discussion of the merits of cemetery site recordation in public records as an added means for the protection of these sites. In this regard, the cemetery dedication laws, at least in Louisiana, counsel a contrary approach to preservation than exists in much of archaeology. In archaeology, precise site locations are commonly redacted from publicly available sources in order to minimize the risk of site looting (La. R.S. 41:1609). However, because Louisiana operates under a concept known as the Public Records Doctrine (Mengis 1990), the public recordation of cemeteries’ existence can serve as precisely as the greatest protector from unintended (or in Mr. Jetton’s case, maybe even intended) impacts. The significance of such enhanced protections through recordation was evidenced after Mr. Jetton was evicted from the cemetery property when Bossier Parish sought to expand a road passing the cemetery. At that point, because of the cemetery’s recorded existence in the public records, the parish had to alter its road widening plans in order to avoid any remaining portions of the cemetery that might be impacted by development.

While this study is situated primarily within a review of the Louisiana’s existing law relating to land use when human remains are interred thereon or entombed therein, comparing *de jure* mandates for the protection of such sites with the *de facto* realities of several sites in New Orleans and Baton Rouge, its intent is both to inspire similar inquires in other jurisdictions as well as to bring to the fore underused cemetery site protections that are present in one form or
another in many Western legal traditions. Some of the measures reviewed and proposed in this
dissertation could have helped to prevent the alleged cemetery damage caused by Mr. Jetton and 
they may be useful for other sites in the future. These measures are aimed at providing agency 
among both marginalized and nonmarginalized groups in the process of modern interactions with 
the dead.
CHAPTER 2

THE CEMETERIES OF NEW ORLEANS AS WINDOWS INTO STRUCTURAL VIOLENCE ON A LANDSCAPE SCALE

A review of the de jure cemetery protections in Louisiana (Chapter 3) should lead the casual observer to the conclusion that cemeteries in that state are sacrosanct in all instances of their interactions with development or other conflicting uses. However, examining the de facto treatment of both spaces of the dead and human remains in Louisiana leads to a different conclusion. This chapter examines the de facto treatment of cemeteries and human remains in Louisiana—especially in New Orleans—by employing the theory of landscape structural violence. As is set forth throughout this chapter, landscape structural violence is a theory proposed by Seidemann and Halling (2019) that holds that institutionalized or sanctioned violence against certain sacred spaces, especially cemeteries, constitutes a vestige of ingrained cultural biases and prejudices used, whether intentionally or unintentionally, by enfranchised peoples and institutions to inhibit the personal growth of marginalized and disenfranchised groups. Although the concept of structural violence long predates Seidemann and Halling’s (2019) work, this source first clearly articulated a theory through which to examine differential treatment of spaces of the dead for clues to broader cultural relationships and to tease out possible explanations for past actions taken against certain cemetery sites.

A. Landscape Structural Violence and New Orleans’ Cemeteries

Whitehead (2010:1) describes the idea of a landscape as occupying both physical and cultural spheres in the human consciousness: “the notion of ‘landscape’…signifies not just material geo-forms and structures but also the way in which the cultural imagination occupies and signifies spatial and biological processes and relationships within discreet limits…a

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4 The landscape approach to analyzing cemeteries and their interactions with living peoples is supported by the work of Nakagawa (1987).
landscape is created not just through the presence of human artifact but also through the way in which narration invests meaning in apparently ‘natural’ earth-forms.” In this regard, cemeteries are particularly poignant, as both the physical places where humans house their dead and as the metaphysical and psychological storing places of the hopes, fears, and lore of a people (Moen 2020; O’Gornam et al. 2020; Strangstad 1995). As described by Bowring (2011:252) cemeteries are “memory-filled and melancholy places that provide a dark counterpoint to the relentlessly new world of capitalism and consumption.” Such locations make for an important focal point in which to study interactions of the persistence of the significance of such spaces and the treatment of those spaces by the establishment. While scholars such as Whitehead (2010:3) are interested in the manifestation of violence in the landscape (e.g., “the notorious gates of Dachau…[and the] aesthetic terror in the making of this monstrous landscape of death”), this chapter focuses on the violence wrought against the landscapes of memory themselves and not the violence that may have occurred in those spaces and its present collective memory.

Classifications of the cemetery as a unique cultural landscape are not new. Indeed, as Pristolas and Acheson (2017:49) have noted, cemeteries are landscapes that, “provide a window into the changing economic fortunes and cultural values of a community.” Moreover, archaeologists have long valued these unique spaces as cultural microcosms for the study of trends in material culture (Dethlefsen and Deetz 1966; Veit and Brooks 2011). Kniffen (1967), partially reviewing the work of Dethlefsen and Deetz (1966), challenged scholars to look to Louisiana’s diverse necrogeographic landscapes as sources of cultural data not available from archaeological sites and archival sources. Stewart (2007) recognized the special nature of cemeteries as repositories of communal mourning for those lost at sea and Seidemann (2014b)

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5 Occasionally, such violence against cemetery spaces is evidenced in the archaeological record. For example, recent work in Leżajsk, Poland, unearthed the gravestones of the town’s Jewish cemetery that was destroyed in the 1939 deportation of the town’s Jews to the Soviet Union (Lobell 2020).
has utilized these unique spaces for insight into modern expressions of popular culture (see also Hobbs 2005). Smith (2009) and Downer (2015) have used cemeteries as microcosms of cultural expression and memorialization for marginalized peoples (Lemke 2020). The idea of cemeteries as microcosms of particular cultures was heralded by Francaviglia (1971) in the early 1970s, but these sites have remained, in some respects, understudied in the anthropological literature, especially as windows into past prejudices.

What has occurred more recently is some amount of confluence of the concepts of cemeteries as special cultural landscapes with the literature on violence against such landscapes (Duncan 2004; Seidemann and Halling 2019). As Duncan (2004:207) indicates, such violence, “includes denying the deceased a resting place or destroying the soul of the deceased.” Seidemann and Halling (2019) have extended this notion to the physical destruction of these spaces and to the denial of living communities’ ability to commemorate and venerate their dead through the destruction of such spaces.

The notion that cemeteries are marginalized on the landscape is similarly not new (see e.g., Sheppard-Simms 2016), as these spaces are often located out of view of the living in the first instance (Nance 1999; Smith 2017). However, it is the interaction between these already marginalized spaces and expanding development that creates potentially violent encounters. New Orleans presents a unique laboratory for analyzing cemetery damage and destruction, as recent archaeological excavations in the city have revealed both sanctioned and unsanctioned examples of such actions. These actions are examined here through the lens of the concept of structural violence, a theory of differential treatment of human groups by governmental institutions or social structures, in an effort to answer the question of whether institutional violence can be exerted towards a landscape such that it reinforces preexisting social prejudices.
The concept of structural violence was introduced by Johan Galtung in the peace and violence literature in 1969 (Chopra 2015; Cocks 2012). In his seminal work on this topic, Galtung (1969:170) defined structural violence by juxtaposing it against standard violence thusly: “the type of violence where there is an actor that commits the violence [is] personal or direct, and [the] violence where there is no such actor [is] structural or indirect.” Galtung (1969:170-171) further explained that,

whereas in the [the case of personal or direct violence] consequences can be traced back to concrete persons as actors, in the [case of structural violence,] this is no longer meaningful. There may not be any person who directly harms another person in the structure. The violence is built into the structure and shows up as unequal power and consequently as unequal life chances.

Farmer (2004:307) has explained Galtung’s concept of structural violence from an anthropological perspective as “violence exerted systematically—that is, indirectly—by everyone who belongs to a certain social order....” Galtung (1980) later clarified the concept of structural violence when he stated that “violence, then is anything avoidable that impedes personal growth....”

Structural violence is, as currently discussed in the social sciences literature, a concept of unequal treatment—usually unintentionally and unwittingly—of minorities, the poor, and the otherwise disenfranchised by the established order (usually a government) (Parsons 2007). Much of the literature stemming from Galtung’s (1969) introduction of structural violence has related to differential treatment of living peoples (e.g., Scheper-Hughes 1992; Farmer 2004). As set forth below, the concept of structural violence has recently been applied to the postmortem treatment of human remains as an extension of the differential treatment of the disenfranchised beyond the grave (e.g., Littleton and Frolich 2012).
To date, scholars of structural violence have only applied the idea minimally to the landscape. Certainly, authors have discussed the psychological implications of significant and violent landscapes on living people (e.g., Whitehead 2010) and even Galtung (1969) postulated that violence could be effected on a landscape as object violence or as psychological violence (rather than structural violence). However, whether the differential treatment of certain peoples experienced in life (Galtung 1969) and in death (Fowler and Powers 2012; Nystrom 2014; Halling and Seidemann 2017) can be extended to the postmortem landscape through selective violence directed at the final resting places of the disenfranchised is not considered in the literature.\footnote{A recent exception to this rule is a variation on the contents of this chapter by Seidemann and Halling (2019) (Rosenzweig 2020).} Scholars such as Blakey (2010:61) have indicated the importance of understanding this differential treatment among disenfranchised communities, when commenting on descendants’ reactions to the contested potential outcomes for responding to the discovery of the African Burial Ground in New York City, he observed that the community wanted “assurance that ‘we’ have human dignity in death.”

Galtung’s (1969) concept of structural violence was tailored for analyzing violence affected through the establishment against living people. However, in recent years, anthropologists and historians have begun to extend the notion of structural violence from actions impacting living minorities or less-privileged individuals to the treatment of these peoples’ remains after death (Nystrom 2014; 2017). In these studies, the effects of structural violence are observed directly on skeletal remains as evidencing differential treatment of human remains among or between groups in a population. Such differential treatments include subjecting such individuals to post-mortem experimentation and the maiming or destruction of their mortal remains.
Structural violence is often discerned quite simply when visited on the living (e.g., Farmer 2004). Indeed, Halling and Seidemann (2017) have recounted evidence in the historical record of New Orleans of the specter of such violence in a context that could manifest in the postmortem record. In this regard, these authors document the fear in the nineteenth century African-American community that medical professionals were intentionally killing patients in order to use their bodies for experimentation.7

Identifying evidence of structural violence affected on the dead is more difficult. In the absence of historical records of this violence (which are often nonexistent), evidence of this violence must often be inferred from the skeletal record. Certainly, as Ruth Richardson (1988) and Suzanne Shultz (2005) have ably documented in the historical records of the United Kingdom and the United States (respectively), the bodies of the poor and minorities were used in postmortem medical training and research. However, with a few famous exceptions (e.g., Burke and Hare in Edinburgh and the skeletal remains excavated from the Medical College of Georgia basement) (Richardson 1988; Blakely and Harrington 1997), little direct evidence definitively links such violence to the postmortem violent treatment of human remains. Thus, when researchers such as Douglas Owsley and colleagues began writing about postmortem evidence of medical experimentation on human remains from Charity Hospital in New Orleans in the 1990s (Owsley et al. 1990), they tread new ground. Nonetheless, this relatively recent area of inquiry has produced a respectable body of literature and researchers have succeeded in demonstrating that structural violence can and does extend beyond life through the violent and sometimes demeaning treatment of the remains of the disenfranchised after their deaths (e.g., Davidson 2007; Lans 2020).

7 Horn (2018) also recounts similar events in New York City in her recent book on Blackwell’s Island’s nineteenth century asylum, almshouse, workhouse, and prison.
In addition to inquiries into the postmortem treatment of human remains, bioarchaeologists have developed a considerable amount of literature in recent years examining structural violence visited on people during life. For example, research such as that reported by Harrod et al. (2012) examines skeletal evidence for institutional violence against Chinese immigrants in Nevada in the late nineteenth and early twentieth centuries. Harrod et al. (2012:92) report on findings of substantial antemortem trauma on the skeletal remains of a sample from Carlin, Nevada, suggesting that such immigrants were an “‘at-risk’ population” as targets of violence by the white majority. In addition, Harrod et al. (2012) identified substantial skeletal evidence of hard work on these people’s remains that is consistent with the menial labor of the lower socioeconomic classes of the time.

While questions regarding whether a particular cut mark on a bone is a result of taphonomic processes, careless excavation techniques, or actual postmortem violence are often difficult to answer, the complete disappearance of a cemetery from the landscape is (generally) a bit more noticeable. In spite of the general obviousness of the absence of a cemetery from the landscape, the cause of such disappearances is a bit more complex. For example, in New Orleans, the Jewish Gates of Mercy cemetery disappeared from its original location in the twentieth century. Despite the fact that Jews are often disenfranchised and would constitute a suspect class of individuals for disparate treatment under the theory of structural violence, a review of the historical record indicates that this cemetery disappeared intentionally, as discussed fully in Chapter 5, at the behest of its descendant community (Seidemann 2018a; 2018b). As such, with the involvement of the minority group in the decision-making process for the landscape alteration that is the removal of a cemetery, the disappearance of the Gates of Mercy
Cemetery cannot confidently be constituted as some variant of structural or landscape violence against that community.

The recent history of the African Burial Ground site in New York City represents perhaps one of the more flagrant examples of institutional action threatening violence to a cemetery (Frohne 2015; Lemke 2020). In that case, federal authorities identified a burying ground for enslaved Africans on the proposed construction site of a United States General Services Administration building in Manhattan. Although the discovery of this site immediately post-dated the passage of federal legislation directed at protecting certain graves, that law was inapplicable to this site and, even today, New York has yet to pass meaningful state legislation to protect unmarked burial sites. Because no federal equivalent exists of non-Native American human remains protection like Louisiana’s Unmarked Burials Act, no legal structure existed within which the African-American descendant community of New York City had standing to protect the African Burial Ground site. Further, although New York jurisprudence protects dedicated cemetery property (see e.g., St. Agnes Cemetery v. State), such protections are underused for unmarked cemeteries. Ultimately, whether a federal government agency would protect this disenfranchised people’s burial site when most laws did not mandate that protection became the subject of protests. As Blakey (2010:62) observes, the preservation of the burial site is due only to the involvement of activists and the “agency’s bureaucratic arrogance [that] led it to violate both the legal requirements of public input and careful archaeological resource management.”

The descendant community’s response to the plans to develop the African Burial Ground site with little or no consultation or respect for the memory of those interred at the site is

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8 This federal legislation, NAGPRA, was inapplicable to this site because that law protects only certain Native American burial grounds and is particularly useless for non-Native cemeteries (Blakey 2010; Seidemann 2010).
9 3 N.Y.2d 37, 43 (1957) (recognizing restrictions on land put to cemetery uses).
emblematic of both the sensitivity of such sites and the real effects that such violence can have (if carried to completion) on the memories of the dead and the psyches of the living (see also Hong 2017). The handling of this interaction of development with the dead is a prime example of violence meted out by an institution (i.e., the federal government) on a disenfranchised people (i.e., enslaved African dead) through the structure of the institution. The African Burial Ground debacle is structural violence on a landscape scale.

Importantly, two types of landscape structural violence at play in some of the cemetery examples related in this dissertation. The most common type of such violence is the initial erasure from the landscape of any evidence of the cemetery and that site’s reuse as something other than a cemetery. This sort of violence is on display in the Jetton case recounted in Chapter 1. The second type of violence, although less common, is the later excavation of such site without consent or consultation with the descendant community. This disturbance, as is set forth in the following chapters, is, in part, a problem that several recent laws have sought (with varying degrees of success) to avoid. The lack of consent from descendant communities regarding the treatment of their lost and then refound spaces of death can constitute a separate act of landscape violence against these people discussed in Chapter 6 in the context of recommendations for increased descendant agency in cemetery-related decision making.

Returning to New Orleans, the above-noted example of Gates of Mercy Cemetery enables an inquiry into the negative disappearance of cemeteries from the landscape. Indeed, much like what could have happened with the African Burial Ground had the public been complacent or ambivalent, recent archaeological work in New Orleans has identified cemeteries that were erased from the landscape with seemingly no participation by or acquiescence of the descendant community (e.g., Gray 2017). Further, though these erasures of certain cemeteries
(e.g., Charity Cemetery No. 2, St. Peter Street Cemetery, and others), are generally prohibited by law (Seidemann 2014a; 2018a; 2018b), the disappearance of such sites often had the imprimatur of authorization or the tacit acquiescence of the government. In other words, the government either sanctioned, permitted, or did not restrict the destruction of these cemeteries—thus adding structure to the violent landscape change.

New Orleans is certainly not alone in this regard in Louisiana. Archaeological evidence reviewed in Chapter 5 suggests that even the “blue-blood” Highland Cemetery in Baton Rouge suffered damage as a result of such governmental complacency (Seidemann and Kleinpeter 2014). Examples of deliberate destruction or desecration of cemeteries across the United States are legion and are much more common than deliberate relocations of such sites (e.g., Hoffer 2020; Sanders 2020; Shahzad 2020). Accordingly, structural violence occurs on a landscape scale through the erasure of certain peoples’ memories by a destruction of the final locales where a trace of their mortality exists—cemeteries.

Indeed, Galtung (1969:170) hinted at such a notion as landscape violence when he spoke of “object violence:”

Is destruction of things violence? Again, it would not be violence according to the complete definition above, but possibly some “degenerate” form. But in at least two senses it can be seen as psychological violence: the destruction of things as a foreboding or threat of possible destruction of persons, and the destruction of things as destruction of something very dear to persons referred to as consumers or owners.

In this regard, Galtung (1969:170) speaks of “the destruction of things…[that] are something very dear…” to people. Galtung’s above quotation fails to clarify whether he had in mind the destruction of landscapes or mere corporeal movable items. Certainly, destruction of either of

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10 In this regard, historic newspapers demonstrate that the New Orleans government was actively involved in efforts to repurpose Charity Hospital Cemetery No. 1 as a gas station (Anon. 1930).
these substantially impacts anyone to whom those things are important, but cemeteries, as the final resting places of a people, seem something apart from the items referred to by Galtung (1969:170) as things held by an oppressed people as “consumers or owners.” Thus, the destruction of cemeteries should be treated as part of a broader landscape violence that is not damage to mere corporeal movables. Moreover, because cemetery site destruction is often carried out in full view (or with the tacit approval) of those with institutional authority to prevent such damage, this type of object violence appears to be much more related to the structural violence when it is visited upon the minority and marginalized dead.

The above discussion leads necessarily to the question of whether violence can be affected on the landscape or is such activity merely a form of psychological violence? Undoubtedly, a loved-one’s final resting place occupies a significant psychological place for people (e.g., Bates 2020; Ellis 2003; Russell 2003; Sloane 2018). Axiomatically, then, the loss of such a place represents a violent psychological event. Indeed, such a notion comprises a considerable underlying factor to NAGPRA’s passage (McKeown 2012). Contemporary media presents more recent examples when intentional or accidental acts disrupt grave spaces (see e.g., Reever 2018a). No doubt, psychological violence is a problem in the disparate treatment of minorities, and for reasons discussed below, such a descriptor seems insufficient to capture the both the psychological impacts of burial disturbances and the physical alteration of the landscape through cemetery destruction (Bates 2020). In this regard, Galtung (1969:169) distinguishes psychological violence, which he describes as “violence that works on the soul [which includes] lies, brainwashing, indoctrination of various kinds, threats, etc. that serve to decrease mental potentialities” with actual physical violence. Admittedly, Galtung’s concept of physical violence is that directed at humans and not things, but the above description of psychological violence is
insufficient to cover the physical activities inherent in landscape alteration that effect on people’s psychological wellbeing concomitantly. For this reason, landscape violence appears to be a separate type of physical violence that has tangential psychological implications.

Threats to cemeteries from development and desecration are nothing new in the literature (e.g., Seidemann 2013, 2014a; Joiner and Seidemann 2019a; 2019b). In a recent variation on this topic, Schexnayder and Manhein (2017) review threats to south Louisiana’s historic cemeteries not from these traditional sources but from the loss of Louisiana’s coastline and the cultural heritage that is lost along with the land. Each of these types of landscape alteration—development, desecration, and anthropogenically enhanced land loss—could be caused by some institutional (development and land loss) or personal (desecration) violence. As yet, the land loss causation for cemetery disappearance is not evident in New Orleans and, though desecration does occur in the city (Mustian 2016), it is not the focus of this research. The cemeteries reviewed below (see Figs. 3 and 4) have been impacted by development and the brief history of their disappearances is presented for the purposes of comparing and contrasting whether such events constitute violent acts perpetrated on the landscape.
Figure 3. Maps adapted using the Louisiana Department of Natural Resources’ SONRIS GIS system with 2016 aerial background (left) and current USGS quadrangle map mosaics (right) with four of the five cemeteries discussed in this chapter (St. Peter’s Street, Girod, Locust Grove, and Gates of Mercy) identified.
Figure 4. Maps adapted using the Louisiana Department of Natural Resources’ SONRIS GIS system with 2016 aerial background (left) and current USGS quadrangle map mosaics (right) with the fifth cemetery discussed in this chapter (Charity Hospital Cemetery No. 2) identified.
1. Charity Hospital Cemetery No. 2

Charity Hospital Cemetery No. 2 (also known to as Cypress Grove No. 2) now lies beneath Canal Boulevard at the intersection with City Park Avenue in the Lakeview area of New Orleans (Jumonville 2016a). This cemetery served, from the mid-1800s through the early 1900s, as an overflow cemetery for the indigent dead of New Orleans who died at Charity Hospital and were unclaimed or whose families were unwilling or unable to pay for their burial (Halling and Seidemann 2017). The cemetery also contains considerable medical waste from Charity Hospital. Like the still visible Charity Cemetery No. 1 on Canal Street, all of the burials in Charity Cemetery No. 2 were inhumations and there is no surviving evidence to suggest that any above-ground crypts existed on the site. According to Jumonville (2016a), in the 1920s, this burial space was converted from a cemetery to a major thoroughfare in New Orleans. According to Douglas Owsley (pers. comm. 2020), then an anthropology professor at Louisiana State University, in the 1980s during reconstruction work on Canal Boulevard, excavations were permitted on one side of the street and burials on the other side were bulldozed. What several archaeological examinations have demonstrated is that, though any surface evidence of the cemetery was eliminated, the subsurface interments were left when the road construction occurred (e.g., Owsley et al 1990; Smith and Stone 2014; Garcia-Putnam 2021). Although there were disturbances and desecrations to some graves when Canal Boulevard was built, many of the burials remain intact and undisturbed beneath the current roadway. Only when repairs and improvements to the road are undertaken do further disturbances of these burials occur. Effectively, Charity Cemetery No. 2 is a sealed burial site of New Orleans paupers from the mid-1800s through the early 1920s. No surface evidence of this cemetery remains and most New Orleanians are unaware of its presence.
2. St. Peter Street Cemetery

The St. Peter Street Cemetery was one of the earliest colonial cemeteries of New Orleans (Dedek 2017). Roughly in operation from c. 1725 through the 1790s, this in-ground burial site was located along the literal ramparts of early New Orleans (modern day Rampart Street) (Gray 2017). The city officially closed the cemetery in 1789 and allowed the site to be filled with structures. The city quickly subsumed the cemetery site, which was not preserved intact in contrast to its later neighbor, St. Louis No. 1. In fact, as Gray (2017:23) notes, “a Royal Decree…approved…the use of the old [cemetery] for the construction of residences” (Fig. 5). Further, Gray (2017:23) correctly observes that, “this latter point is significant, as it makes clear that the old cemetery had been intended for re-use for non-burial purposes almost from the moment that it was closed,” a reality that contradicts with Spanish law on such property uses at the time (Seidemann 2018a). As with Charity Hospital Cemetery No. 2, the St. Peter Street Cemetery has left no trace of its existence above ground, and the cemetery is now located beneath various structures along the south side of Rampart Street. Archaeological excavations at this site revealed a varied suite of permanent inhabitants, from recently arrived enslaved Africans to free colonial inhabitants of the city (Gray 2017). As with Charity Hospital Cemetery No. 2, the interments in St. Peter Street Cemetery have effectively been sealed in place by overlying construction that intermittently impacted the site by new construction activities over the centuries.

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11 Although not the subject of this research, there has been debate in the past regarding whether the decree that removed the dedication from the St. Peter Street Cemetery was validly obtained (see Morazán 1972 and Gray 2017 for a review). Nonetheless, the legal effect of the decree as it relates to the dedication removal, especially this long after its issuance with later parties relying in good faith on its existence, is that there is no longer a cemetery dedication burdening this property.
Orden de 2 de Mayo de 1789 aprovando la ereccion de Nuevo cementerio. Copia-Enterado el Rey de _____ M. _____ en su carta _____ 12 de Nov. del año _____ parado no. 17 acerca de la construccíon de un nuevo cementeríio fuera de era ciudad y fábrica de casas en el terreno que ocupa el actual de ha servido _____ aprovar los medio que M. _____ y de si _____ lo comunico á M. para su inteligencia _____ de quenta _____ de las resultar.

Figure 5. A copy of the royal decree for the repurposing of the St. Peter’s Street Cemetery in the collections of the Records of the Diocese of Louisiana and the Floridas, 1576-1803, Archives of Notre Dame: IV-4-e A.L.S. 5pp 8vo. A very rough translation of this incomplete (due to illegible handwriting) transcription indicates that the document is a copy of the royal decree of May 2, 1789, in which King Charles IV authorized, “construction of a new cemetery outside of the city and the construction of houses on the land occupied by the current” cemetery.
3. Locust Grove Cemeteries No. 1 and 2

Located in an area bounded by Magnolia Street, Sixth Street, Seventh Street, and Freret Street in Uptown New Orleans, the Locust Grove Cemeteries were among the city’s nineteenth century potter’s fields (Jumonville 2016a). Documentary evidence suggests that interments in these cemeteries ceased around 1879 (Branyon 1998). The surrounding neighborhoods used the site as a dump (Gray 2020) and, by 1889, the sites comprised the location of the first of three schools known as the Thomy Lafon School (Branyon 1998). According to Branyon (1998), these cemeteries consisted of in-ground interments likely only memorialized on the surface by perishable grave markers (most likely wooden).

The impacts of placing a school atop a cemetery were apparently not considered in the late nineteenth century and later archaeological investigations suggest that most, if not all, of the interments were left in place underneath the school (Branyon 1998; Pope 1985; Anon. 1952). In fact, the first indication that the general public was made aware of the possibility that a long-forgotten historic cemetery was located near the Thomy Lafon School came in the 1950s, when renovations to the school unearthed caskets and human remains (Landry 2009; Anon. 1952). However, this knowledge and whatever attention it received due to a newspaper report on the findings did not stop the use of the property as a school. Indeed, in 1986, additional human remains and cemetery artifacts were recovered by University of New Orleans archaeologists when they were encountered during plumbing work in the schoolyard (Branyon 1998; Pope 1985; Anderson and Belanger 1985). This encounter also did not prompt any further investigation of the site or any dialogue regarding the proper memorialization of the former cemetery on the school property. In fact, officials only recognized that the law had long mandated meaningful consideration of the property’s original (and continuing) status as a
cemetery (Caldwell and Seidemann 2010a, 2010b) until Hurricane Katrina decimated the Thomy Lafon School and the Federal Emergency Management Agency began work with the Orleans Parish and Recovery School Districts for the possible rehabilitation of the school. In the wake of Hurricane Katrina, the burden of remediating a massive nineteenth century cemetery on the school site led city, state, and federal officials to convert the Thomy Lafon School to a greenspace that commemorated not just the historic cemetery and those still interred at the site, but also the significance of the Lafon schools as important locations in the burgeoning twentieth century civil rights movement in New Orleans (Hahn and McCarthy 2012). Today, this site is a park.\footnote{The decision for this site to be used as a park was in keeping with historical overlap between cemetery spaces and parks (\textit{e.g.}, Bender 1974; Brown 2013; Evensen, \textit{et al.} 2017).}

Unknown to government actors during the immediate post-Katrina efforts to reuse the Thomy Lafon property, New Orleans Mayor Martin Behrman issued a directive in 1905 with regard to the Locust Grove cemeteries (Hahn and McCarthy 2012; Seidemann and Halling 2019), much like the royal decree that lifted the cemetery dedication from St. Peter’s Street Cemetery. After a city attorney opined that it was permissible to reuse cemetery space, an ordinance issued in 1905 by the City of New Orleans removed the dedication from Locust Grove Cemetery Nos. 1 and 2 and authorized the construction of the Thomy Lafon School on top of them (Hahn and McCarthy 2012). Although a concurrent ordinance directed the city’s contractor to “remove with due respect any remains found in Locust Grove Cemetery No. 1 to Locust Grove Cemetery No. 2,” (New Orleans City Ordinance No. 2945, March 15, 1905) the above-noted archaeological investigations suggest that though superficially well-intentioned, the city apparently did not follow through on its own directive to move the cemetery. Interestingly, though, because Mayor Behrman passed the ordinance removing the dedication in 1905, this
property is no longer subject to the cloud on its title that the cemetery dedication represents. Accordingly, the reuse of this site may be accomplished without removing all remains from an area of potential impact, but rather by mitigating any potential impacts pursuant to the Unmarked Burials Act and otherwise sealing the rest of the site for posterity.

4. Gates of Mercy Cemetery

Located in the Central City area of New Orleans along Jackson Avenue, the Gates of Mercy Cemetery was in use from 1828 until 1872 by the Touro Synagogue Jewish congregation (Dedek 2017). Following the congregation’s establishment of a new cemetery location in the early twentieth century, the Gates of Mercy Cemetery began to fall into disrepair and, by the 1950s was characterized by the Louisiana Supreme Court in the matter of *Touro Synagogue v. Goodwill Industries of New Orleans Assn, Inc.*, as having “fallen into ruin.”¹³ Because of the dilapidated state of the cemetery, the Touro Synagogue community decided to sell the property and move the remains of those interred on the site to a new location. This move became the subject of a court dispute between an attorney appointed to represent the interests of the dead in the cemetery and the synagogue and prospective purchaser—Goodwill Industries, Inc. (*Touro Synagogue* 1957). Unlike the other cemeteries discussed above, the reuse of the Gates of Mercy property was an action that was contemplated and supported by the descendant community. Also unlike the cemeteries discussed above, the mortal remains of those interred in this cemetery space were removed (to Hebrew Rest Cemetery No. 1) pursuant to law before the area once occupied by the cemetery was put to an alternative use (*Touro Synagogue* 1957) (though it is questionable whether all human remains were actually properly recovered from the site, an attempt was made to move the burials [Caldwell and Seidemann 2010c]). This cemetery was ultimately put to alternative uses following the court challenges.

¹³ 96 So.2d 29, 33 (La. 1957).
5. Girod Street Cemetery

Perhaps one of the more storied cemetery reuse examples in New Orleans is the Girod Street Cemetery, formerly located on the site now occupied by parking garages, Champions Square, and (partially) by the Superdome in downtown New Orleans (Dedek 2017). This cemetery was a Protestant burial ground in use from the 1820s until perhaps the 1930s. Similar to the Gates of Mercy Cemetery, the Girod Street Cemetery, by the time of its reuse, was, according to the Louisiana Supreme Court, in a state of dilapidation and disrepair (City of New Orleans v. Christ Church Corp.).\textsuperscript{14} Unlike the rest of the cemeteries discussed above, this site was an above-ground burial space, characterized by the stereotypical New Orleans wall vaults and above ground tombs. Also like the Gates of Mercy situation, the Girod Street Cemetery’s descendant population consented to the planning and reuse of the site (Christ Church 1955). Ostensibly, the remains from this site were removed pursuant to law and developers used the property for alternative uses. However, despite the alleged clearance of all such material pursuant to the relevant court orders, later opportunities to conduct limited archaeological reconnaissance within the footprint of the former Girod Street Cemetery revealed human remains in at least one locale (Owsley pers. comm. 2020).

B. Does the Disappearance of Cemeteries Constitute Some Manner of Violence?

As alluded to above, impacts to cemeteries that erase their existence from the landscape appear to fall under the classification of violence proposed by Galtung in 1969. Although not a perfect fit for the types of violence that Galtung (1969) proposed, as the reuse of cemeteries for noncemetery purposes likely falls somewhere between structural violence and object/psychological violence, the effect, in many cases, on the descendant community is some form of violence.

\textsuperscript{14} 81 So.2d 855 (La. 1955).
As noted above, structural violence is recognized as actions by an institutional or organizational entity that impede the personal growth of a minority or disenfranchised person or group. In order to fully understand whether impacts to a landscape, cemeteries in particular, can constitute some form of violence, it is crucial to understand whether their damage or destruction can cause problems that impede a person’s or group’s growth.

Certainly, anecdotal evidence supports the idea that damage to someone’s grave or to a cemetery has crippling psychological effects on people. Indeed, in the wake of recent grave space disruptions in a Eunice, Louisiana, cemetery, family and attorneys for a mother whose child’s grave was damaged now claim that the grief occasioned by that damage was the proximate cause of the mother’s untimely death (Reever 2018b). Beyond the anecdotal evidence such as this case and the legion of other news reports around the world that recount people’s feelings of anger and grief when graves are damaged (e.g., Masters 2020; Shahzad 2020), the adverse impacts of grief to an individual’s personal growth are also well-documented in the academic literature (e.g., Anderson and Gaugler 2006; Hogan and Schmidt 2002).\footnote{It is interesting to note that, though much of the bereavement literature acknowledges the negative impact of grief to individuals’ personal growth (Hogan and Schmidt 2002:619-620), recent work has also shown that there may be later personal growth rebounds as a result of the grief (Riley et al. 2007). Indeed, as recently noted, personal growth deriving from grief is considered a “successful adaptation” to a loss and not a \textit{sine qua non} of such an experience. (Anderson and Gaugler 2006:304, citing Hogan \textit{et al.} 2001, and defining “personal growth” as “increases in tolerance, compassion, forgiveness, and hope…”}

Even as early as the 1920s, Alfred Kroeber (1927:308-309), observed “…the powerful affects released by death and the fact that affects are not expressed spontaneously in culture…,” indicating the significance of burial places and their long-lasting relevance for people (see also Cannon 2002).

At least during the period that most of the cemeteries discussed here were in operation and decline (\textit{i.e.}, the nineteenth century), scholars documented that the grieving process included regular visits to the cemetery as a place to commune with the dead (\textit{e.g.}, Walls 2011). Although...
some debate regarding the continuance of these grieving practices into the twentieth century (Walls 2011), clearly sites of actual violence or death (as opposed to cemeteries) are becoming more significant locales for visitation and commemoration in the mourning process (Jacobs 2004). Thus, little doubt exists that cemeteries continue to figure largely in various individuals’ grieving practices (see e.g., Woodthorpe 2011).

These spaces are thus important from both a mourning and a historical perspective and removing them from the landscape has significant impacts on both aspects of cemeteries’ common uses (Wyndham and Read 2011; Maples and East 2013). As poignantly noted by Miller and Rivera (2006:334), “whether the bodies of the deceased are placed in the ground, within elaborate tombs, or simply in the presence of ancient or contemporary monuments, their location holds symbolic meaning as well as practical historical meaning for the surrounding living community.” Accordingly, denying the unique nature of cemeteries is difficult (Sheppard-Simms 2016) and, because of their connections to the grieving process and the historical nature of a particular place, impacts to these spaces that erase them from the landscape clearly impact the descendant community. Indeed, Leshem (2015:35) recently observed that “particularly in colonial and postcolonial contexts, burial grounds have played a pivotal role in indigenous assertion of history and communal identity, resistance to land dispossession and the use of subversive practices in the face of colonial urban policies.” In the United States, such assertions are limited to indigenous peoples, but also apply to descendants of enslaved peoples. In this regard, Blakey (1996:xiii) has observed with regard to African-American cemeteries that “cemeteries are shown to resonate with a people’s sense of self. African American identities are entombed, marked, fought for, preserved, celebrated, symbolized, mourned, and incorporated in the cemeteries they describe.”
As a practical matter, the removal of a cemetery from a landscape may sever from the descendant community the ability to continue the grieving process or to have a place within which to commune with a direct link to its history. In other words, in cases where a decision to remove a cemetery from the landscape is made not by the descendant community, but rather by or with the consent of the government, this action directly results in an erasure of the collective memory of those interred in the cemetery from the landscape. Such an action, whether intentional or not, represents the final act to eliminate the existence of a community from the landscape.

An important reality to bear in mind with such erasures is that they are not all illicit. In this regard, a cemetery may be lawfully removed from the landscape contrary to the wishes of the descendant community as long as the landowner follows the mandates of the cemetery dedication laws and the terms of the applicable burial removal permit. While such removals may still represent landscape structural violence, they are not unlawful. Such a reality, while greatly disfavored by the courts in Louisiana and elsewhere, is the paramount right of private landowners in the United States (see e.g., cases discussed in Seidemann 2013; Joiner and Seidemann 2019a; 2019b).

Although the disappearance of many cemeteries from the landscape can be classified as violent acts, not all landscape changes qualify as violent. The cemeteries reviewed here present examples of both violent and nonviolent landscape changes.

1. Charity Hospital Cemetery No. 2

In the case of Charity Hospital Cemetery No. 2, little doubt exists that the historic decisions that led to the erasure of this site from the landscape, and in many ways from the collective memory, were acts of violence perpetrated by a powerful structure on a powerless
descendant community. With this cemetery, the historic record evidences no efforts made by the city or developers to make contact with the descendant community prior to removing the surface evidence of the cemetery’s existence and converting that space to a roadway. Indeed, this act not only constituted violence against the largely destitute New Orleans population of the nineteenth and early twentieth centuries, but the perpetrators also violated the law in carrying out these acts.

In this regard, such acts violate the long-standing existence of restrictions against using cemetery property for anything other than the interment of the dead as discussed in Chapter 4. Despite the knowledge that these violent acts occurred, it is impossible to directly understand the impacts of this landscape alteration on the descendant community. Although the historical record is silent, such violent acts likely represented a loss of identity of the dead and a stripping of agency from the descendant community that perhaps kept them from reaching their full potential. However, through inference from current scholarship, it is possible to deduce that, because such spaces are important to the grieving process and because disruption of that process can have significant adverse impacts on the living, violence was wrought upon the descendant communities as a result of the destruction of these cemeteries (Maples and East 2013). Thus, the development activities that led to the disappearance of at least Charity Hospital Cemetery No. 2 meet the qualifications to represent violence carried out against the landscape with effects on the descendant communities.

Indeed, as Trouillot (2015) has insightfully observed, such silences in the historical record are evidence of such structural violence. In this regard, Trouillot (2015:48) states that “[i]nequalities experienced by [people] lead to uneven historical power in the inscription of those traces.” Moreover, “[s]ources are thus instances of inclusion, the other face of which, of course, what is excluded” (Trouillot 2015:48) demonstrates the ability for disenfranchised peoples to be
further erased from history, not just from a violent physical act against their person or significant landscapes, but through the recordation of only the history of the enfranchised. Such a reality is crucially important in understanding the often anemic historical record associated with the cemeteries of the disenfranchised. Furthermore, Trouillot (2015) essentially makes the case for archaeology’s utility in providing information of those powerless past peoples whose histories were not recorded—a use that is employed in this dissertation. Such an approach is supported by Sloane’s (2018:2) argument that “[i]n Western society today, we have come to believe that everyone deserves to be remembered, no matter how famous or obscure, young or old, rich or poor.” Thus, where the historic record provides little or no information regarding the existence or destruction of cemeteries, archaeology can be used to partially fill that void and to give voice to those lost in the historical silences.

2. Locust Grove Cemetery Nos. 1 and 2

The Locust Grove cemeteries, once thought to have been subjected to analogous violence to that visited on Charity Hospital Cemetery No. 2 (Caldwell and Seidemann 2010a; 2010d) is now known, through the work of Hahn and McCarthy (2012), to be somewhat different. When Mayor Martin Behrman issued the 1905 ordinances directing the closure of the cemeteries (Fig. 6), the relocation of the remains interred therein, and the construction of a school on the property, he technically complied with the centuries-old customary legal process of removing the cemetery dedication on that land. Importantly, because there was in 1905 no statewide statute mandating the removal of the cemetery dedication through a court proceeding as there is today, the city’s enactment of an ordinance (a law) to put the property to an alternative use and to remove the remains constituted a valid dedication removal at the time. Thus, Mayor Behrman followed jurisprudential and customary cemetery law with those ordinances and properly lifted
the title cloud of the cemetery dedication on the subject tracts of land. With the passage of those ordinances, the land could be put to alternative uses and the subsequent series of schools were lawfully built. However, the failure of the city to follow through on the legal mandate to remove the remains from that site can be interpreted as nothing less than violence against the descendant community of the Locust Grove cemeteries.

It is impossible to conceive of a scenario in which either city employees or school contractors for the original Thomy Lafon school were unaware that the remains had not been removed from the former cemetery cites. Perhaps Mayor Behrman and the New Orleans City Council—those who passed the 1905 ordinances—had clean hands in this matter through their directive to remove the

Figure 6. New Orleans City Ordinance Nos. 2945 and 3759, March 15, 1905, held in the City Archives at New Orleans Public Library.
remains, but later subsurface disturbances and archaeology that demonstrated that the Locust Grove property is choked with human remains leaves no doubt that those working on the site knew of the failure to move the remains. Although this act of violence—comprising the failure to move the remains of the Locust Grove cemeteries’ permanent inhabitants—was not perpetrated at the highest levels of New Orleans government, it still meets the definition of structural violence, because those with superior positions and status (i.e., city bureaucrats and building contractors) perpetrated against those in inferior positions (i.e., the descendants of the city’s poor) and, as with the structural violence at Charity Hospital Cemetery No. 2, these acts deprived the descendant community of their ability to visit an important site of grieving and wiped that site from the community’s collective consciousness.

3. St. Peter Street Cemetery

Although later development erased the St. Peter Street Cemetery, like both the Charity and Locust Grove cemeteries, from the landscape, the potential impact upon a disenfranchised descendant community by this action is unclear. Thus, the disappearance of this cemetery from the New Orleans landscape falls into a different category of surface alterations than those discussed above. As noted previously, the St. Peter Street Cemetery contained the remains of both enslaved peoples and free New Orleanians (Gray 2017), representing a clear demographic difference from the impoverished Charity and Locust Grove cemetery populations. However, as with these three cemeteries, no historical evidence confirms consultation with or participation from the descendant community in the decision to put this property to a non-cemetery use. In fact, according to Gray (2017), the royal edict issued in Spain initiated the decision to repurpose this land. In the absence of such consultation, had the interred population been anything like that of Charity or the Locust Grove cemeteries, one could conclude that the decision to remove the
surface evidence of this cemetery represented an act of violence against a disenfranchised people. Indeed, if future archaeological research on this site reveals that those who were buried at the site of a high socioeconomic status or of a particular ethnicity were removed prior to the cemetery’s reuse for other purposes, then one could conclude that this reuse is likely not an example of violence may change.

At this time, however, economic expediency stipulated the conversion of the St. Peter Street Cemetery from a place of burial to commercial. In the 1780s, removing surface evidence of a cemetery and reusing the property for commerce was easier than going through the laborious process of removing the remains from the property. King Charles IV likely considered this issue when he issued his 1789 edict, and eventually, as was the case here, people simply forgot that the cemetery existed until it turned up on old maps. In this regard, the treatment of St. Peter Street Cemetery is substantially similar to that of Highland Cemetery in Baton Rouge. As noted above, this latter cemetery contains the remains of Baton Rouge’s elite but it is clear that, over time, the surrounding neighborhood contracted around the cemetery boundaries (Seidemann and Kleinpeter 2014). Indeed, old maps show burials in the place where single-family residences now stand adjacent to the modern boundaries of Highland. As with the St. Peter Street Cemetery, such reuse of cemetery property may or may not constitute a violent act of the ruling class or the bureaucracy against a disenfranchised people. Indeed, such a Marxist perspective of cemetery impacts as violent acts by the elite against the proletariat—the perspective that Galtung (1969) had proposed in his early writings on violence—simply does not fit all scenarios (Parsons 2007). Sometimes greed, expediency, or ignorance simply wins the day and no particularly oppressed people are impacted by the disappearance of all or a portion of a cemetery from the landscape.
4. Gates of Mercy and Girod Street Cemeteries

The final two New Orleans cemeteries considered here fall into the category of those spaces converted from burial places to other uses in which the historical record clearly demonstrates no violence against a disenfranchised community. In both the Gates of Mercy and Girod Street Cemetery examples, the descendant communities, represented by their respective religious institutions and legal representatives, actively participated in the deconsecration of the cemeteries and the movement of the interments to other final resting places. At least, this is the traditional understanding of these events based upon the published cases. As is demonstrated from archival sources (Chapter 5), it is possible that this movement may have been superficial. The reported court cases that recount the transformations of these spaces from sacred ground to other uses certainly indicate that opponents to the conversions existed. However, with both of these cemeteries, the descendant communities approved of their erasure pursuant to law and in full view and with their tacit (if not explicit) approval. Thus, neither of these cemetery destruction events can be said to represent violence in a Galtungian sense. Indeed, even though evidence supports a poor job of retrieving the interred remains from the Gates of Mercy Cemetery was done (Caldwell and Seidemann 2010c) and Girod Street Cemetery (Owsley, pers. comm. 2020), this potentially sloppy cemetery move cannot be said to undermine the consent and knowledge of the descendant community granted in the 1950s. Therefore, modern reuses of the site should certainly proceed with caution as, though stripped of its cemetery dedication protections, the identification of human remains at a former cemetery site still triggers the restrictions and permitting mandates of certain Louisiana archaeology laws.

Based upon the above review of New Orleans cemetery repurposing, a picture of a unique form of violence emerges that is ascribable to cemetery destruction, though that violence
does not exist each time a cemetery is destroyed or removed from the landscape. In order for such acts to constitute violence in a Galtungian sense it is not enough that a disenfranchised people is on the receiving end of the act (i.e., the impoverished New Orlenians in the case of Charity Hospital Cemetery No. 2 and the Locust Grove Cemeteries), but a lack of consent existed from or participation by the descendant community in the decision to move the cemetery. The latter component is missing from the Gates of Mercy and Girod Street cemeteries and perhaps from the St. Peter Street Cemetery makes suggestions dubious regarding accusations of such violent landscape changes. In this regard, and specifically with respect to St. Peter Street Cemetery, it is important to consider that many of those interred in this space were enslaved peoples. Because it is a substantial certainty that no consent was sought from the descendants of these people prior to the repurposing of the cemetery by royal decree, even the adherence to the de jure law of the time (i.e., the removal of the cemetery dedication prior to the land’s reuse) cannot really be said to have been done with the consent of the enslaved people.

Because cemeteries occupy a unique place (when compared to other types of land) in the consciousness and even the subconsciousness of at least most Western cultures, violent acts directed at these spaces rise above the level of mere violence against an object (Seidemann and Halling 2019). Often grouped with spaces in which great calamities or battles occurred (Walls 2011), cemeteries are indeed unique (Maples and East 2013). The effect of violence that erases these spaces from the landscape runs deeper than the demolition of a beloved structure. It functions to erase from the collective consciousness the final vestiges of the actual existence of people. When these people have been disenfranchised during life, their resting places in the cemetery are often all that is left of their memory. The demolition of such spaces with no consideration for the descendant community effectively erases whatever tenuous links such
disenfranchised people had to immortality. Because the consequences of such violent acts are so grave to the collective consciousness of a people, the violent demolition of cemeteries should be considered a form of structural violence and not, as Galtung (1969:170) might argue a “‘degenerate’ form” of violence.

This notion of the psychological significance of a link between a group’s history and identity and their ability to access the cemetery sites of their presumptive ancestors has been on full display in Louisiana recently as descendant groups of enslaved peoples in St. James Parish have conducted their own archaeological research to ensure the protection of such sites located on industrial property (Coastal Environments, Inc. 2020a; 2020b). These presumptive descendants have even gone so far as to file legal proceedings in federal and state court to gain access to the sites and to protect them from future disturbance.\(^{16}\)

CHAPTER 3
NAGPRA AND ITS LOUISIANA PROGENY

Arguably the passage of NAGPRA is the most visible acknowledgement in United States history of the systemic, indeed structural, violence against the dead. Although the passage of this law in 1990 predates much of the adaptation of Galtung’s (1969) concept of structural violence to the dead in scholarly circles, the law clearly demonstrates all of the hallmarks of human rights legislation intended to atone for perceived sins of the past and the lack of consultation and agency afforded to such people regarding the treatment of their ancestors’ remains occasioned by the systematic treatment of Native American human remains in a manner that, whether intentional or not, “…impedes personal growth…” (Galtung 1980) in many Native American communities.

Following more than twenty years of lobbying on the part of the Native American community (McKeown 2012), the United States Congress passed NAGPRA,\textsuperscript{17} thereby setting in place 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 human remains and burial sites (McManamon 2001).\textsuperscript{18} NAGPRA is seen by many, as it was characterized by Senator John McCain during the congressional debates on the law, as:

\begin{quote}
legislation [that] effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interests of our Nation’s museums in maintaining our rich cultural heritage, the heritage of all American
\end{quote}

\textsuperscript{17} 25 U.S.C. 3001 \textit{et seq.}; P.L. 101-601. McKeown (2008) states that this lobbying began in earnest in 1986, but later (McKeown 2012) notes, along with Thomas (2000), that the effort was a longer-running process.

\textsuperscript{18} NAGPRA was not the first statement by legislatures in the United States on the treatment of Native American human remains (Zimmerman 2014). It was preceded by the National Museum of the American Indian Act, P.L. 101-195, 20 U.S.C. 80(q), which regulated repatriation of the Smithsonian Institution’s collections. Additionally, a few states issued burial protection laws prior to 1990. Missouri’s RS MO. 194.400-410, passed in 1987, is an example of such a state law (Price 1988).
peoples. Above all,…this legislation establishes a process that provides the dignity and respect that our Nation’s first citizens deserve.¹⁹

Understanding the significance of NAGPRA’s passage and the changes that it wrought on human remains and cemetery site protection is impossible without an understanding of the genesis of the law and the events leading to its passage. Properly conceptualizing the past 30 years of both human remains and cemetery protection legislating in the United States is also not possible without a complete understanding of NAGPRA and its history.

A. NAGPRA and the Treatment and Protection of Native American Human Remains and Cemeteries

The tension between indigenous peoples and the anthropological community over the latter’s treatment of the former’s skeletal remains, came to a head over certain revelations during the congressional efforts to establish the National Museum of the American Indian. Though such tensions had been simmering for years, they reached a boiling point in the mid-1980s during congressional testimony regarding the size of the indigenous skeletal collections housed at the Smithsonian Institution (Seidemann 2003; 2004). These revelations led to nationwide inquiries into the treatment of Indigenous human remains and cemetery sites which, in turn, substantially led to the passage of NAGPRA in 1990. NAGPRA represents, at least with respect to the treatment of indigenous human remains in the United States, a significant development resulting from (though not exclusively) the Civil Rights movements of the 1960s (Thomas 2000). The laws passed during this period in the United States aimed directly at providing agency and protection to disenfranchised people. As an outgrowth of such laws, NAGPRA provides direct agency to Native peoples over the control of their deceased ancestors’ remains. Human remains, as objects imbued with substantial psychological and metaphysical significance for descendant

¹⁹ Senator John McCain (R-AZ), Congressional Record, October 26, 1990, p. S17173. See also Lynge (2008), who observes that repatriation law in any country is human rights legislation.
communities, when treated poorly, disrespectfully, or inconsistently with the wishes of oppressed people, fall within the penumbra of concepts covered by Galtung (1969) when he introduced the concept of structural violence as a theory within which to analyze and combat disproportionate treatment of certain people.

During the Civil Rights movements, while the more visible African-American civil rights protests and demonstrations dominated the news, other minority groups also began to assert their dissidence with Anglo-America. The so-called “Red Power” movement began in the mid-1960s (Josephy 1971). This movement represented a Native American backlash against nearly five hundred years of oppression, and is recognized as the turning point in Native American perspectives regarding the treatment of their dead and their cemeteries (Thomas 2000).

In 1969, Vine Deloria, Jr., published his provocative book, *Custer Died for Your Sins: An Indian Manifesto*. In this book Deloria attacks virtually all non-Native American institutions in the United States; one entire chapter is devoted to anthropologists. While making such lighthearted jabs at the anthropological community as “Indians are certain that all societies of the Near East had anthropologists at one time because all those societies are now defunct” (Deloria 1969:83), some of Deloria’s observations were acute and have become a sounding board for Native Americans across the United States. Deloria (1969:97) commented that “[a]cademia [including anthropology], and its by-products, continues to become more irrelevant to the needs of the people.” Further, Deloria (1969:98) characterizes anthropology and Native American relations thus: a “[c]ompilation of useless knowledge ‘for knowledge’s sake’ should be rejected by the Indian people. We should not be objects of observation for those who do nothing to help

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20 The term “Native American” is used as a general moniker in this study roughly referring to those who ethnically and culturally identify themselves with the indigenous peoples of the New World. The use of this term is with cognizance of the reality that “Native America” is made up of diverse cultures, all with individual cultures, identities, and belief systems (see Afrasiabi 1997; Dunbar-Ortiz 2014). This is a reality often missed by the legal community, evident when authors speak of “Native American religion” rather than “Native American religions.”
us.” Over the past thirty years, this perspective and the associated political activity led to increased agency among Native American groups regarding their historic existence in the “New World,” that often developed into a general distrust of the pronouncements of academic anthropology—especially those on topics related to the peopling of the New World (Mihesuah 1996) and the prehistory interpreted from the analysis of cemeteries and human skeletal remains (Riding In 2000; Zimmerman 2007). A general consensus exists among Native American communities with respect to the researching of skeletal remains and cemeteries for the purpose of understanding past cultures, indeed, their own cultures, that Indigenous peoples do not need to know such things (see e.g., Hammil and Zimmerman 1983).

Because of the extreme variation of cultures and perspectives within Native America, concluding that all Native American people are not interested in learning about their past through human remains analysis is impossible. Rather, likely the sole unifying theme among these groups seems to be a desire for increased agency in such endeavors. Native American groups want to participate fully in decisions regarding control of the content and methodology of what is studied (if anything is studied at all). This general positon continues to evolve over time. As collaboration between archaeologists and Indigenous Americans increased, levels of comfort and trust allow for more research to be undertaken (e.g., Farris 2003; Simon 2006; White 2014). Moreover, and contrary to one recent publication’s allegations (Weiss and Springer 2020), the more agency afforded to Native Americans in the conduct of this research, the more cooperative such endeavors become. Such cooperation must be not just a passive cooperation, though. Weiss and Springer (2020:159) criticize what they call collaborative research as one-sided in which passive living Indigenous research subjects can restrict later uses of the data collected by non-Indigenous institutions and researchers. This work, particularly the blood studies on the
Havasupai peoples that generated considerable press in the early 2000s (e.g., Shaffer 2004), apparently raises questions about informed consent and smacking of research debacles such as those surrounding the HeLa cell research (Skloot 2011)\(^{21}\) and the Tuskegee syphilis research (Thomas and Quinn 1991),\(^{22}\) are not the sort of constructive collaboration that is now sought by most anthropologists or Native Americans. Rather, for collaborative research to be meaningful and to allow continued access to human remains for study, it must be truly collaborative—research that provides agency to the studied populations if not participation in the research design and data collection and analysis. Passive collaboration, absent Indigenous consent, is no longer tenable as a research model.

In discussions of the results of repatriation and Indigenous agency, the focus is often on the perceived loss to science of viable research subjects and objects when materials are returned to descendant communities (e.g., Weiss 2008; Weiss and Springer 2020). Such alleged losses are often overstated and are based on isolated examples. Weiss and Springer’s (2020) focus on a handful of ancient human skeletons that were repatriated is one such example. Contrary to Weiss and Springer’s (2020) assertions that repatriation represents an us (scientists) versus them (Indigenous peoples or descendant communities) fight over the control of truth—one that is based on the age-old dispute over the establishment of religion by legislation (NAGPRA)—emerging scholarship suggests that indigenous religious beliefs play but a minor role in

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\(^{21}\) The HeLa cell research referred to here is the continuing research (e.g., Xia, et al. 2020) on cancerous cells extracted from Henrietta (“He”) Lacks (“La”) in the 1950s without her or her family’s consent that today forms the basis of genetics-based cancer research around the world (Skloot 2011). The poor, African-American Lacks became the unknowing and unconsenting donor of cellular material when she was being treated for cervical cancer at Johns-Hopkins University and has recently become the standard example of failures of medical informed consent and the use of disenfranchised peoples as unwitting medical test subjects.

\(^{22}\) The Tuskegee syphilis research was longitudinal research of African-Americans at the Tuskegee Institute in the early-to-mid-twentieth century sponsored by the United States government and others that was later shown to have been withholding critical aspects of the research and treatment from the test subjects. The study took advantage of the patients’ lack of agency to use them as “‘clinical material, not sick people.’” (Thomas and Quinn 1991:1501). This research was later characterized as “almost like genocide” by the CDC (Thomas and Quinn 1991:1502).
repatriation efforts. For example, Simpson (2008:64) identifies situations in which the return of remains and associated burial objects work to “…contribute to the production of living heritage…” in Indigenous groups’ efforts to “…revitalize their cultural heritage.” The empowerment of Indigenous and descendant communities that arises from such repatriations is no less important or significant than the data that might be available to scientists from these peoples’ remains and cultural patrimony. Indeed, as noted by Watkins (2008), such importance is largely dependent upon the perspective of the individual advocating for or opposing repatriation. Moreover, personal experience has demonstrated that assisting in the provision of descendant agency and supporting repatriation efforts actually can result in more scientific inquiry being collaboratively undertaken. Because of these multifaceted benefits for Indigenous and descendant communities, the importance of collaborative efforts in repatriation scenarios cannot be simply reduced to a science versus religion binary. Thus, when Weiss and Springer (2020) go so far as to equate modern repatriation efforts with attempts to muzzle science in the evolution/creation disputes, they fail to consider nuances and non-religious factors in such discussions, thereby denigrating any argument in support not just of repatriation, but of any science-Indigenous/descendant collaboration. This forced dichotomy is unsustainable in view of the multiple interests of all involved in human remains studies and the multiple truths that can be elicited from such studies and interactions.\(^{23}\) Rather, as Poirier and Bellantoni (1997:231) have suggested, “[i]rrespective of rhetoric, a new philosophy and momentous change has been established, with ancestral rights coming to the forefront of the decision-making process.” When

\(^{23}\) An example of the actual recovery and repatriation efforts of human remains as representing additional cultural and historical information regarding the remains—especially when those remains are of unknown individuals—can be found in Seidemann (2017). What this source demonstrates is that, though sometimes repatriation results in an end to data collection on a particular set of remains, the story of that individual continues to inform anthropology and history through its broader post-mortem journey narrative.
the rhetoric is removed, what is left is a collaborative process to researching and managing human remains and burial sites.

Part of working within this collaborative research process, it is crucial to acknowledge that many Native American religions contain concepts of creation that describe how their people came to their current locations, how they have interacted within and without their groups from the dawn of time, and why they have acted in this way (Rivera 1989; Mihesuah 1996). Under such a world view, science’s divining or discovery of contradictory or even supportive evidence is of no consequence to such peoples’ world views (Toner 2020). Indeed, many Native Americans consider science as just another of the world’s religions, with no greater claim to legitimacy than their own (Thomas 2000). In addition to the general disregard for Western science’s methods and questions, many Native American groups have begun to compile their own histories based upon their oral traditions (Thomas 2000). As Jones and Harris (1998:260) observe, the compilation of these histories “often means disputing the scientific version—not necessarily because it is wrong but because it does not contribute to the version of history which the indigenous communities wish to affirm.” In other cases, Indigenous Americans have expressed concerns regarding traditional scientific inquiry’s inherent importation of colonialist notions and ideals (Tsosie, et al. 2020). In such situations, there is not so much of a rejection of scientific inquiry as a cautioning of the means of conducting that inquiry on Indigenous peoples’ remains and the importance of decolonializing such inquiries by engaging with Indigenous communities during the conduct of such research.

Central to many Indigenous Americans’ objections to science, and especially the work of archaeologists and physical anthropologists, is their opposition to the disturbance of the dead for

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24 Such perspectives are not limited to Indigenous Americans as Muyard (2016) has demonstrated among the indigenous inhabitants of Taiwan.
research purposes. As Roger Byrd, a Lakota medicine man, once commented (Hammil and Zimmerman 1983:15), “[w]e don’t believe in digging up our own people, nor do we believe in digging up other people. When we bury our dead, we use sacred ceremonies, we do certain sacred rituals….It is one of our [religious] laws that we leave our dead alone.”

In addition to the tension between anthropologists and Native Americans in the 1970s and 1980s, looters acting outside of any scientific community and operating under no ethical codes were (and still are) destroying Native American sites—including burial sites—at an alarming rate. This destruction, especially that of the mass desecration of the Slack Farm site in Kentucky in 1987, figured largely in Congress’ decision to enact some legislation that could protect Native American burials and cemeteries (Henderson 2015). At about the same time, Louisiana tribes (particularly the Tunica-Biloxi) were experiencing their own problems over looting and preservation of their material cultural identity with the dispute over the Tunica Treasure. This dispute also figured into the debates over controlling the looting of cultural patrimony and human remains that led to the passage of NAGPRA a few years later (Klopotek 2011).

Considering the complex history between Native Americans and anthropologists over the past century and a half, Congress’ passage of NAGPRA should not have been surprising. Modern looting by relic hunters aside, anthropologists’ past questionable ethical behavior did much to precipitate Congress’ action in 1990. In order to properly understand the significance of NAGPRA and its progeny, it is essential to briefly review this structurally violent history.

Much of early anthropology began as an imperialistic study of the “other.” Often, the situs of each particular researcher’s work defined the “other.” For example, the Iroquois in his home state of New York exemplified Lewis Henry Morgan’s “other” for his kinship research
As anthropology began to grow as a field of social scientific inquiry in the early twentieth century, such founding individuals as Franz Boas, Margaret Mead, Ruth Benedict, and Bronislaw Malinowski focused their research of the “other” on the indigenous inhabitants of the Northwest Coast (Boas 1909), Samoa (Mead 1928), the Southwestern United States (Benedict 1934), and the Trobriand Islands (Malinowski 1922) (Bohannan and Glazer 1988).

In the United States, Native Americans provided the fertile ground for early anthropological research. Thus, in so many American cases, the “other” existed as one group or another of Native Americans. The perceived importance of studying such groups at the time was informed by the notion that indigenous groups that were largely untouched by European influence and continued to practice traditional lifeways offered windows into our shared past as human beings and that, with enough data on such “primitives,” a picture of humanity’s origins could be developed (Bohannan and Glazer 1988). The push to conduct largely ethnographic research among these peoples was driven by the colonial, paternalistic view that such groups were dying off and that research in the then-current push of European colonialism across the globe could provide unique data on our shared past as humans (Mead 1960).

Running in a largely parallel track with anthropology (specifically, socio-cultural anthropology), and substantially informing its understandings of the interrelatedness (or lack thereof) of living and non-living groups, was the development of the subfield of physical anthropology. This field was (and to a large extent, still is) characterized by its examination of living and dead humans and closely related non-human primates in order to understand

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25 This term is used here in quotation marks to indicate the perspective of many anthropologists of this time that the livings peoples that they were studying were a “primitive” other or something of a throwback to early humanity. For example, Robert Lowie (1970:ix) once defined “primitive” thusly: “[t]he word ‘primitive’ by its etymology suggests ‘primeval,’ but when the anthropologist speaks descriptively of “primitive peoples” he means no more—at least, he has no right to mean more—than peoples of a relatively simple culture; or to be more specific, the illiterate peoples of the world.”

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adaptations and changes in human development and structure over time (Barrett 1997). While this field of inquiry did not grow out of Darwin’s work in *On the Origin of Species* (1859), his (and Alfred Russell Wallace’s) research and writing substantially influenced others’ ideas that life adapted slowly to various environments and from other outside or selective pressures. Unfortunately, both early anthropologists and anatomists\(^{26}\) applied Darwin’s basic biological evolution theories in ways not envisioned or intended by Darwin.\(^{27}\) The result of this unfortunate usage effectively provided scientists and social scientists of the mid-nineteenth century with what they believed justified the treatment of non-white peoples—and in the United States, especially Native Americans—as an “other,” allowing them to disregard their humanity in life and in death. This improper interpretation led to the rise of social Darwinism among social scientists and a general disrespect for the human remains of the “other” among scientists undertaking studies on the dead. Indeed, early research on human crania by such as Samuel Morton (2009), a Philadelphia anatomist, were specifically tailored to justify the existence of race as a biological construct and the differential treatment of these “others” (most of Morton’s “others” were Native American and African-American) during life (Gould 1981). Within this context and through existing prejudices of the nineteenth century friction (and worse) existed and continues to exist between the anthropological and Indigenous communities today.

A significant offshoot of this colonial treatment of Native Americans by early anthropologists that has caused considerable strife within contemporary Indigenous groups (not just Native Americans) include cemetery desecration the associated collection and continued

\(^{26}\) Many early researchers of human skeletal anatomy were physicians by training and the field did not really emerge as an anthropological subdiscipline until the collaborations of Franz Boas (trained as a physicist) and Aleš Hrdlička (trained as a physician) in the final decade of the nineteenth century.

\(^{27}\) It is well documented today that Charles Darwin saw the application of his theories to interpretations of culture as improper and that late nineteenth century and later notions of racism were anathema to Darwin’s theories and thinking (Desmond and Moore 2009).
maintenance of aboriginal skeletal collections in museums and universities collected under less-than-ethical means by many anthropologists, archaeologists, and museum curators. Examples of such acquisitions are legion and the several specific examples reviewed here are presented for demonstrative purposes only.

In 1897, Franz Boas and Aleš Hrdlička, the fathers of American anthropology and physical anthropology, respectively, arranged for the transportation of six live Greenlandic Inuit to the American Museum of Natural History (“AMNH”) in New York for the purpose of cultural and physical study (Harper 2000).28 Not long after arriving in Manhattan, most of the Inuit contracted tuberculosis and died. Anthropologists and anatomists dissected and curated their remains into the museum’s collections; this, despite the fact that the museum staff had conducted a false burial of at least one of the Inuit in order to convince the others that the body had been successfully laid to rest (Thomas 2000:77-83).

Independent of the AMNH activities, Hrdlička conducted reconnaissance expeditions to Alaska for the Smithsonian Institution’s National Museum of Natural History (“NMNH”), in which he collected scores of Alaska Natives’ remains to increase that museum’s holdings. Details of these expeditions in Hrdlička’s diary illustrate the often shady means by which he made his acquisitions. These expeditions included sneaking around living Alaska Natives so that they would not catch him removing bodies from their cemeteries (Hrdlička 1943). Many of the remains collected in this manner by Hrdlička have been or are in the process of being repatriated by the NMNH (Loring 1995; Pullar 2008).

28 The “physical” study should be qualified here. At that time, physical anthropology was much concerned with the morphology of living individuals (hair, blood, and measurements of “fleshed” specimens), an area of study that is waning, but not extinct in the modern physical anthropological literature. For an example of such studies, see Hrdlička (1908).
Misappropriation of Indigenous remains during the nineteenth and early twentieth centuries commonly existed outside of the United States. Paul Turnbull (1991) reviewed the acquisition policies of the Australian Museum and found similar, if not more shocking, policies than those in the United States. Edward Ramsay, curator of the Australian Museum during the late nineteenth century, openly encouraged the collection of recently-deceased Aborigines by means akin to grave robbing. Anthropologists and anatomists acquired many of these remains after veritable ethnic cleansings in rural parts of the country. Indeed, Ramsay even produced a publication that detailed the methods for removing the skull and brain of a fleshed individual without damaging the “specimen.” Ramsay also arranged for the museum’s acquisition of skulls of the Moriori, offering Australian Aborigine skulls as an exchange. Stories of such acquisitions by the United States Army during the “Indian Wars” also abound, with battlefield killings being collected, crated, and shipped to Washington, D.C., for study within hours of the end of battles (Colwell 2017).

Beyond the questionable acquisition practices of early anthropologists, some of the research was either based on or used to support preexisting prejudices—mostly along racial lines. In this regard, Samuel Morton’s cranial capacity studies of the late nineteenth century are a prime example (Morton 2009). Morton began his cranial capacity research with at least two general premises in mind: (1) the larger the cranial capacity, the larger the brain, and thus the smarter the individual; and (2) there would be a ranking of intelligence based upon this research with Western European whites at the apex, followed by Asians and Native Americans, with Africans and African-Americans at the bottom. Morton set out to prove his preconceived notions, often forcing the data to fit his conclusions (Gould 1981). Although this work was roundly debunked by a reanalysis of Morton’s original data in the 1980s (Gould 1981), the
stigma associated with such seemingly scientific efforts that use human remains to justify structural violence, a stripping of agency, and a general sense that Native peoples and others are less than human has colored the relationship between such groups and anthropologists for the entire history of the field.

Considering this bleak and sordid history, it is not surprising that, following decades of lobbying by Native American groups, the United States Congress passed NAGPRA in 1990. Indeed, many of the stories reviewed here became part of the congressional record during these hearings, leading the Congressman from American Samoa, Representative Eni Faleomavaega, to comment on the record that “the next anthropologist I catch coming to Samoa, I’m going to shoot him.”

Indigenous peoples thus viewed the passage of NAGPRA as a watershed civil rights moment (Thomas 2000). Though this law, Native Americans, Native Hawaiians, and Alaska Natives acquired agency never before realized (Klopotek 2011): They had the ability and authority to participate in the dialogue regarding the return of their ancestors’ remains and they earned a guaranteed seat at the table in discussions over future disturbances of such human remains.

Comment of Rep. Faleomavaega during the Joint Hearings before the Committee on Interior and Insular Affairs House of Representatives and the Subcommittee on Libraries and Memorials of the Committee on House Administration and the Subcommittee on Public Buildings and Grounds of the Committee on Public Works and Transportation, One Hundred First Congress, H.R. 2668, National American Indian Museum Act, p.226 (March 9, 1989). In fairness, this was apparently a recurring statement by Rep. Faleomavaega, who, in 2006, during the Joint Hearing before the Sucommittee on Africa, Global Human Rights and International Operations and the Subcommittee on Asia and the Pacific of the Committee on International Relations, One Hundred Ninth Congress, p. 178 (March 29, 2006), stated that “[t]he next time I catch an anthropologist coming to my islands, I am going to shoot them. We have had more problems [with] these anthropologists studying my people to death.”

It is important to note that the United States was not the first nation to enact such sweeping legislation to protect indigenous human remains. Australia passed similar legislation in 1984 and other countries have followed suit since (Seidemann 2004; 2020). Other nations, such as Sweden, have also worked towards repatriation of materials to their own Indigenous people (Harlin 2008).

Although outside of the scope of this study, it is crucial to note that NAGPRA provided such agency only to federally-recognized Native American tribes, Native Hawaiian Organizations, and Alaska Native Corporations (Chapman et al. 2020). Although later state enactments have expanded the reach of human remains protection laws to state-recognized groups and others, this remains a shortcoming of NAGPRA.
Importantly, many scholars in the physical anthropological and archaeological communities opposed the process that led to the passage of NAGPRA (Thomas 2000; McKeown 2012). However, some scholars’ predictions about the end of a profession and field of scientific inquiry ultimately,\(^{32}\) with some fits and starts, became a basis for indigenous/scientific collaboration regarding site protection and respect for the remains of the indigenous dead (McKeown 2012; Boutin et al. 2017; Watkins 2020). Indeed, although NAGPRA had detractors during its congressional debates and even in its early years, most anthropologists felt that the repatriation of culturally affiliated human remains to living descendants was the morally correct response. As a result of the efforts to return such remains, the ties and allegiances formed between Indigenous peoples and those in the anthropological and museum communities led to far reaching benefits (Ubelaker and Grant 1989; Bernstein 1991; Dongoske 1996; Ferguson 1996; Monroe 1993). Today, even the most ardent repatriation opponent from the 1970s-1990s largely admits to the success of NAGPRA and similar laws to bringing together otherwise opposed groups of scientists and the descendant community (c.f., Weiss and Springer 2020). In an open e-mail to the membership, Society for American Archaeology President Joe Watkins characterized NAGPRA, on the eve of its thirtieth anniversary, as, “a landmark human rights law that formally acknowledges tribal sovereignty…[and that] its passage transformed the practice of archaeology…” (Watkins 2020). The mandatory consultation process of these laws has substantially contributed to this goal by forcing anthropologists to interact with descendant

\(^{32}\) See generally, Meighan (1992; 1994). Perhaps Meighan’s (1992; 1994) perception that NAGPRA would spell doom for skeletal studies—especially those conducted on Native American human remains—is partially justifiable because of the temporal proximity of his writings to the passage of NAGPRA, What is more surprising is the continued adherence to such a notion on the fringes of bioarchaeology as of this writing (see Weiss and Springer 2020). Simply, the end of this field of study has not come to pass and practitioners such as Weiss and Springer (2020) need to move past the hurtful rhetoric of the early NAGPRA years in order for this field of inquiry to truly thrive.
communities and to implement, at least in part, their interests and desires with regard to their ancestors’ burial sites and remains.

NAGPRA, as it was enacted and as it is now enforced, serves several purposes: (1) it provides Native Americans a means of reclaiming affiliated human remains housed in the Nation’s museum and university collections; (2) it protects Native American burial sites from disturbance or destruction when they are inadvertently discovered; (3) it restricts, to some degree, the amount of scientific research that can be accomplished on skeletal collections; (4) it requires an inventory to be made available to Native American groups of all skeletal remains and associated funerary objects curated by federally-funded museums and universities; and (5) it restricts the illegal trafficking of Native American remains for profit (Seidemann 2003).

Perhaps more importantly than what NAGPRA accomplished for the protection of indigenous human remains was the domino effect that it began for the protection of the burial sites and human remains of non-Native American marginalized peoples across the United States. As NAGPRA is written, it applies only to Native American burials located on federal and tribal lands and Native American human remains in the collections of institutions that receive federal funding (Seidemann and Moss 2009). With the passage of NAGPRA, many states, Louisiana among them, enacted copycat legislation for the protection of burial sites within their borders (Seidemann 2010). Importantly, these state efforts have considerably greater legal

33 The complexity of applying this law to culturally unaffiliated human remains was on display during what was colloquially known as the Kennewick Man litigation (Bonnichsen v. U.S., 357 F.3d 962 (9th Cir. 2004); Bonnichsen v. U.S., 367 F.3d 864 (9th Cir. 2004); Bonnichsen v. U.S., 217 F.Supp. 2d 1116 (D.Or. 2002)) in which Northwest Native American groups fought with several anthropologists over the right to study or reinter the remains of 9,000-year-old human remains discovered in Washington State (Seidemann 2003). This litigation and the vagueness of NAGPRA regarding its application to unaffiliated remains was resolved in 2015 when the National Park Service promulgated regulations of questionable legal authority mandating repatriation of many such remains (Seidemann 2009).

34 Throughout this dissertation, the term “other” is used to refer to non-whites. Such a distinction between those in power (in this case, privileged whites) and those not in power (here, the underprivileged and, more often than not, people of color) has become an important area of inquiry in historical archaeology in the past few decades (Little 1997; Wilkie 2005; Gray 2011).
reach than does NAGPRA. In most cases, state unmarked burial protection laws apply to burial sites and human remains regardless of ethnic or cultural affiliation, a considerably broader application than the Native American focus of NAGPRA. Not all states have enacted such legislation in the 30 years since the passage of NAGPRA, New York representing the most glaring absence from the litany of states that have passed such human rights legislation. Furthermore, most state level enactments reach beyond just public property. By way of example, burial site protections enacted in Louisiana in the wake of NAGPRA apply to state, parochial, municipal, and private property (Seidemann 2014a). Thus, between federal and state laws in most jurisdictions in the United States, there now exists a virtual ban on the disturbance of the burial sites of “others.” The ban is virtual because such sites may be disturbed subject to a permitting process that requires consultation with descendant communities and archaeological precision to remove burials. It is important to note that, though most of these laws protect the graves of “others,” they also protect the graves of the white majority when such graves are encountered in an unexpected context. In addition, under NAGPRA and its state counterparts, it is also unlawful in most jurisdictions to commodify the remains of any such individuals whether they have been obtained prior to or after the enactment of such laws (Halling and Seidemann 2016).

Thus, one of the most surprising results of the passage of NAGPRA and similar state laws has been the focus of the police power on the protection of at least certain types of archaeological sites. Because NAGPRA and other laws contain restrictions and permitting provisions for the disturbance of unmarked burial sites, a new wave of site protection has become available in recent years. Under prior regimes of cultural resources protection laws such as the National Historic Preservation Act of 1966 and the Archaeological Resources Protection
Act of 1979, virtually no power existed to stop the damage of many archaeological sites, especially those not situated on federal or tribal property. However, under NAGPRA and its ilk, not only does substantial power exist to protect the cultural resources embodied by the spaces of the dead, but some of that power is vested in the descendant community of those dead through mandatory consultations. Thus, as recent site protection laws that deal with human remains have been passed, the ability of marginalized peoples to be actively involved in the protection of their own cultural heritage is becoming a reality. No longer do such peoples have to rely on scientific or bureaucratic assessments of significance and importance to invoke the police power of the government to protect certain sites. This accomplishment in the evolution of anthropology’s (often shameful) interactions with “other’s” dead is perhaps the most significant accomplishment of the past fifty years in terms of site and cultural heritage protection. In this regard, the evolution of the spaces of the dead has been substantially impacted—in a positive way—by the past injustices visited upon the mortal remains of marginalized peoples by anthropologists.

It is also important to bear in mind that many states (e.g., Louisiana) already had laws in existence at the time that NAGPRA was enacted that, theoretically, at least should have provided some protection from outright unmarked burial destruction (Seidemann and Moss 2009). Many such laws were enacted in the late 1960s and early 1970s in the wake of the publication of Jessica Mitford’s (1963) cemetery industry exposé, An American Way of Death (Sloane 1991:215). This book was important because it, like Rachel Carson’s (1962) environmental exposé, Silent Spring, riled the public regarding perceived and actual shady actions by members of the death care industry to defraud and upsell the public in times of mourning. This public attention spurred legislators to act to attempt to regulate this industry. Though revolutionary, Mitford’s (1963) examination of the death care industry in the United States was not directed at
cemetery protection or preservation. Rather, Mitford set out to expose what she perceived to be a corrupt industry that would regularly overcharge and upsell grieving families during vulnerable times. Although Mitford reviewed cemetery operations in her book, that review revolved around consumer practices. However, the book’s wide popularity led to congressional hearings and a nationwide reform (mostly at the state level) in the regulation of funeral directing and cemetery operations (West and McKerns 2009). From these reforms arose, among other things, Louisiana’s Cemetery Act in 1974.

B. Louisiana’s Human Remains and Cemetery Protection Laws: 1990 to Present

Provisions such as Louisiana’s dedication laws were codified in 1974 as part of the Mitfordian nationwide effort to regulate the death care industry (Murphy 2007). In a broad sense, these dedication laws provide that once a human body (ethnicity unspecified) is placed in the ground, that piece of property is forever considered to be a cemetery and it cannot be put to any non-cemetery use (Seidemann and Moss 2009; Seidemann 2014a, 2018a, 2018b). Unfortunately, as Quetone (1987) notes, despite the existence of these state anti-desecration laws, unmarked burials, especially those of Native Americans, were often destroyed or disturbed and the perpetrators were seldom, if ever, held to account (see also Tesar 1986; S.Rep.100-601). Indeed, such laws as the cemetery dedication provisions and grave desecration prohibitions both were and are substantially underused protections in most American jurisdictions (Seidemann 2018a).

Importantly absent from the pre-NAGPRA cemetery protection laws of dedication and desecration discussed above are those prohibiting the unauthorized use of human remains. Such laws existed, but, as Halling and Seidemann (2016) have noted, they were and are underutilized

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35 The term “death care” has been defined by Kopp and Kemp (2007:151) thusly: The death care industry can be divided into five primary components: (1) funeral homes, (2) crematories, (3) cemeteries, (4) preneed sales of funeral plans, and (5) third-party sales of funeral goods. (citing General Accounting Office 2003).
in the protection of and prevention of commodifying human remains of any ethnicity. Laws that regulate the possession, ownership, and transmission of human remains generally appear in the form of various states’ iterations of the Uniform Anatomical Gift Act (Bernard 1966). NAGPRA presented a clear procedural mechanism to hold to account those who would commodify Native American human remains and even those holding such remains in institutional collections for research purposes by specifically identifying prohibited actions and providing the descendant community with agency in the form of civil causes of action for certain violations (Seidemann 2003). In fairness, the Uniform Anatomical Gift Act was not designed to stem human remains commodification. Rather, as observed by a commentator in the 1960s, “the Uniform Anatomical Gift Act was drafted specifically with a view to transplant operations” (Anon. 1969:694). NAGPRA thus presented a clear model for legislating such activity that was copied by many states in the years following its passage (Seidemann 2010).

Louisiana’s enactment of the Louisiana Unmarked Human Burial Sites Preservation Act (“Unmarked Burials Act”) in 1991 was part of this state-level movement (Seidemann 2010). No substantive testimony or debate survives related to the passage of the Unmarked Burials Act. Thus, while it is known from anecdotal information that this law was a response to federal legislative movements at the time (i.e., NAGPRA and NMAIA), whether the expansion of this law beyond the federal analogue to cover other groups was a tacit recognition of the structural violence that could disproportionately impact the graves of marginalized peoples is unclear. However, it can be assumed from the illustrative list of other at-risk graves in that law (i.e., “Indian, pioneer, and Civil War and other soldiers’ burial sites”) that the unequal treatment of certain peoples’ graves was not the motivating factor behind this law in 1991. Nonetheless, many states, Louisiana included, enacted burial protection laws that were more comprehensive and
preservation-oriented than is NAGPRA. The stated legislative purpose in La. R.S. 8:672 suggests that the Unmarked Burials Act should be broadly construed. That provision 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.

With this statement, the Legislature recognizes the significant threats to cemetery spaces and it extends its coverage equally, regardless of the ethnic or cultural affiliation 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, thus wrapping into one law (as does NAGPRA) the protection of sites, artifacts, and remains.

Under the Unmarked Burials Act, cemeteries that are otherwise exempt from the purview of general cemetery law in Louisiana (also known as “Title 8”) (i.e., they are not operating cemeteries) are not subject to the regulatory authority of the Louisiana Cemetery Board (“LCB”), but rather are under the authority of the Louisiana Division of Archaeology (“the Division”) by virtue of the Unmarked Burials Act. As created by Act 704 of 1991, the Unmarked Burials Act was placed under the enforcement authority of the Louisiana Unmarked Burial Sites Board. However, in Act 713 of 2006, the Louisiana Legislature rolled this board’s duties into the Louisiana Department of Culture, Recreation, and Tourism, with the board’s permitting duties now resting with the Division, led by the State Archaeologist.
Regulatory authority over isolated and abandoned cemeteries is grounded in the language of the Unmarked Burials Act. That Act specifically defines “unmarked burial site” in La. R.S. 8:673(5) 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.” This definition leads to the following inferences. First, it clearly exempts any cemetery authorized by the LCB (i.e., operating cemeteries) from the regulatory authority of the Division and the purview of the Unmarked Burials Act. Accordingly, this positive statement in the law leads to the conclusion that, if a cemetery holds a current certificate of authority issued by the LCB pursuant to La. R.S. 8:70-8:72, the Division has no jurisdiction over that cemetery, and the Unmarked Burials Act does not apply. Second, clearly exempted from the Unmarked Burials Act’s protection by La. R.S. 8:673(5) are cemeteries classified as “recognized and maintained municipal, fraternal, religious, or family cemeter[ies].” No definition exists in Title 8 for either the words “recognized” or “maintained.” However, within the broader context of Title 8, “recognition” appears to refer to the presence of a cemetery on the LCB’s register of those cemeteries operating but do not meet the threshold requiring that the cemetery possess an LCB certificate of authority to operate a cemetery. Importantly, under La. R.S. 8:673(5), both recognition and maintenance are required to avoid a cemetery’s classification as abandoned. 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 are recognized by the LCB and are maintained can claim an exemption from the Unmarked Burials Act.
As with the term “recognition,” no definition of the term “maintained” exists 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” is required to divine the Legislature’s intended application of the Unmarked Burials Act. “Maintain” is defined as to “keep (a building, machine, etc.) in good condition by checking or repairing it regularly” (Soanes and Stevenson 2006:860). Although an unmaintained cemetery may be the equivalent of what is colloquially referred to as an abandoned cemetery, the question of abandonment is not determinative of the classification of a cemetery as “unmarked.” In other words, if a cemetery is in a poor state of maintenance—a state that evidences years of neglect—although it may not be legally abandoned, it has likely met the requirements for a lack of maintenance sufficient to trigger this prong of the Unmarked Burials Act.

Act 707 of the 2010 Louisiana Legislative Session, known as the Louisiana Historic Cemetery Preservation Act (“Historic Cemetery Act”), was originally introduced and failed to pass the Legislature in 2008 as House Bill 1092 of the 2008 Regular Louisiana Legislative Session. The Historic Cemetery Act is more detailed and more specific to abandoned cemeteries and isolated graves than the preexisting law (i.e., the Unmarked Burials Act). However, a review of Act 707 reveals that the newer law is largely superfluous, and it does not change the preexisting protections of the Unmarked Burials Act. The purpose of the Historic Cemetery Act is similar in nature to that of the Unmarked Burials Act. As noted in La. R.S. 25:933, that purpose is described as follows:

[t]he legislature hereby finds the demolition, destruction, and damage of historic cemeteries and isolated graves a disrespectful practice. The legislature further finds that existing state laws do not provide for the adequate protection of historic cemeteries that are not under the jurisdiction of the Louisiana Cemetery Board, are not on state lands, and are not solely comprised of unmarked graves. Cemeteries are considered by most cultures to be sacred spaces. In addition to
being resting places for our dead, many of Louisiana’s cemeteries are repositories of significant examples of art, architecture, and archaeology as well as containing the history of their respective communities. The importance of cemeteries should not be taken lightly, as these significant elements represent a substantial tourist attraction for the state of Louisiana, and also present an endless source of data for historians, taphologists, anthropologists, archaeologists, and genealogists that collectively lead us to a better understanding of our own culture.

In addition to a recognition of a reverence for the space of death, the Historic Cemetery Act also evidences the importance of such cemeteries as repositories of history for a community and, at least for Louisiana, as a potential tourist draw (e.g., Hotard 2003). These are merely additional reasons for the preservation of these sites that were not noted in the Unmarked Burials Act. In order to fully understand why the Historic Cemetery Act does not change the existing protections for cemeteries under the Unmarked Burials Act, it is necessary to review the scope of several portions of those laws in tandem. In several ways, the Historic Cemetery Act clarifies the extent to which certain cemeteries are protected. This is not an actual change in the law, but the Act certainly provides substantial clarity over the previous law. The jurisdictional scope of the pre-2010 law and that of the Historic Cemetery Act is best set forth in the definitions of the various cemeteries and activities subject to the later law. Under the Unmarked Burials Act, “unmarked burial site” is defined 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.” The Legislature did not intend to confine the Unmarked Burials Act’s protections to cemeteries and graves lacking markers (i.e., a literal definition of “unmarked”), but rather intended for protections to be applied to threatened areas in which human remains were interred, though not to those areas that are cemeteries authorized by the LCB. The Historic Cemetery Act provides concise definitions for “abandoned cemetery,” “historic cemetery,” and “isolated grave” that
clarify that the scope of cemetery protections under Louisiana law extend beyond a narrow reading of the term “unmarked” in the Unmarked Burials Act. Those relevant definitions, in La. R.S. 25:933, are:

(1) “Abandoned cemetery” shall mean any cemetery which is no longer being used for interments, is not being maintained in good condition, and has fallen into a state of disrepair, including tombs and headstones that have collapsed or been destroyed, walls and fences that have fallen apart, and trees and bushes that have grown amongst and within grave spaces.

* * *

(10) “Historic cemetery” shall mean any abandoned cemetery located in the state that is more than fifty years old and is not subject to the laws, rules, and regulations of the [LCB] or Chapter 10-A of Title 8 of the Louisiana Revised Statutes of 1950.

* * *

(12) “Isolated grave” shall mean any marked grave site that is not part of a larger cemetery and is not subject to the laws, rules, and regulations of the [LCB] or Chapter 10-A of Title 8 of the Louisiana Revised Statutes of 1950. The term shall also include groupings of multiple graves that are not part of a larger cemetery.

Because the enforcement jurisdiction of the Historic Cemetery Act and the Unmarked Burials Act both rest with the Division of Archaeology, the scope of protections from both of these laws vests the permitting authority over cemeteries not authorized by the LCB in one state entity. Further, because the prohibited acts under these laws are convergent, their application should be seamless under the Division’s oversight. Under the Unmarked Burials Act, covered human remains are protected against “disturbance” (La. R.S. 8:678). “Disturb” is defined in La. R.S. 8:673(2) as including “excavating, removing, exposing, defacing, mutilating, destroying, molesting, or desecrating in any way any unmarked burial sites or any human skeletal remains, burial artifacts, or burial markers on or in an unmarked burial site without a permit.” The Historic Cemetery Act encompasses the prohibition against disturbance from the Unmarked
Burials Act within its definitions of “damage,” “destruction,” and “modification.” Those definitions provide:

(5) “Damage” shall mean the intentional or inadvertent hurt, harm, or injury to a component of a historic cemetery or to an isolated grave so as to lessen or destroy its historic, cultural, or scientific value.

* * *

(7) “Destruction” shall mean intentionally or inadvertently destroying components of a historic cemetery by violent disintegration of its fabric so as to reduce the components to ruin.

* * *

(13) “Modification” shall mean the altering of the original substance of a grave space.

These same protections are provided for under the Unmarked Burials Act definition of “disturb,” but the Historic Cemetery Act language, by specifically defining these three terms, clarifies the protections available for grave spaces in historic cemeteries or for isolated graves under the Unmarked Burials Act. Further, through the addition of the term “modification,” it is clear that the Historic Cemetery Act extends its grave space protections to substantial modifications, such as those contained within La. R.S. 8:308, 8:903, and 8:903.1. Read together, both the Unmarked Burials Act and the Historic Cemetery Act provide protections for grave spaces against disturbance, damage, destruction, and modification.

The above-reviewed laws constitute the current state of Louisiana’s burial space protections. Nonetheless, despite the substantial legal protections present in no less than six different legal schemes in Louisiana, cemetery damage and the commodification of human remains continued to persist following the passage of the Historic Cemetery Act in 2010 (e.g., Seidemann and Hawkins 2019). Thus, in 2016, the Louisiana Legislature enacted the Louisiana Human Remains Trafficking and Control Act (Act 531 of 2016). This most recent law in
Louisiana regarding human remains treatment goes a step further than laws such as NAGPRA and the Louisiana burial site protection laws by incorporating long-standing civil and common law jurisprudence into the statutory law ensuring that human remains cannot be possessed, owned, or trafficked without the express permission of the deceased and providing for the disposition of remains seized in trafficking operations or those held in unauthorized public or private collections. Importantly, this law does not upend any human remains acquisitions made by institutions of higher learning that are curated according to existing laws or the wishes of the deceased of descendant community.

One additional cemetery protection law worthy of mention is the Criminal Code provision that prohibits grave desecration: La. R.S. 14:101. This law explicitly criminalizes the opening of graves or the theft of burial or grave artifacts. Although Louisiana’s desecration law has existed for some time, it appears to have been seldom used. One probable reason for the lack of reported cases under this law is that it applies to individuals and is penal in nature rather than permissive. In other words, though the law contains restrictions, it may only be applied when a violation has occurred. Contrarily, the preservation laws noted above apply to property and both prospectively shape and restrict the uses of that property rather than merely punishing wrongdoing. Another reason that few desecration cases appear in the reported jurisprudence (indeed, there are no true reported criminal desecration cases in Louisiana), is that a misdemeanor and a violation of this law simply does not warrant prosecutions when a district attorney’s docket is clogged with felonies. Indeed, a recent case of human remains pilfering from Holt Cemetery in New Orleans was pled as a theft rather than a desecration as the former is a felony (Simerman 2016). Thus, while this law is a cemetery protection law, its utility apparently is questionable in most circumstances.
Taken together, little doubt exists that, though not so identified, the notions of structural violence as applied to human remains and burial sites underlie motivations to the passage of NAGPRA in 1990 and likely the Louisiana analogues in 1991 and 2010. Louisiana’s own experiences with grave looting through the Tunica Treasure situation undoubtedly informed these legislative efforts to both provide enhanced protection for human remains and burial sites and to provide agency to disenfranchised groups (Klopotek 2011). Although the legal review in this chapter is somewhat tedious, an understanding of where Louisiana’s law of cemeteries and human remains stood prior to the enactment of NAGPRA and how much it developed since that event is essential. Whether so intended, the agency provided by such laws to disenfranchised groups is important. As Klopotek (2011:94) noted, though in an event that predated the passage of NAGPRA, the Tunica-Biloxi peoples’ acquisition of control over the grave goods and human remains that constituted the Tunica Treasure was, “rank[ed by tribal members] with federal recognition and the opening and the opening of the casino in 1994 as among the most important achievements for the tribe in recent memory.” Unlike when this hard-fought victory under Louisiana’s Civil Code provisions of treasure and abandoned things was litigated (*Charrier v. Bell*, 496 So.2d 601 [La.App. 1 Cir. 1986]), NAGPRA, the Unmarked Burials Act, and the Historic Cemetery Act now provide both agency for such groups as the Tunica-Biloxi in these crucially important scenarios and represent a substantial step towards atoning for the structural violence of the past with respect to the treatment of the burial spaces and human remains of the disenfranchised.

Importantly, through lessons learned in recent desecration cases (*e.g.*, Simerman 2016) and through the enactment of more stringent laws since 2010, a desecration event like that alleged in the Jetton matter would now possibly be viably prosecutable both civilly and
criminally. Certainly, the evidentiary problems of the Jetton matter continue to be problematic for such cases, the law now carries added incentives for prosecution (i.e., the classification of certain such acts as felonies that will be more attractive to district attorneys). In the end, Louisiana’s protections substantially outstripped those set forth in NAGPRA and provide agency to descendant communities and site protection not heretofore extant in much of the United States.
CHAPTER 4
THE CEMETERY DEDICATION AND ITS IMPLICATIONS FOR URBAN STUDIES AND ARCHAEOLOGY

Prior to the advent of NAGPRA and similar state laws, little codified guidance existed regarding both how to interact with spaces of the dead when they are encountered archaeologically or during development and what to do in terms of protecting them from development or other threats (e.g., desecration). As discussed in Chapter 3, since 1990, at least at the federal level, one exception to this lack of guidance is with respect to Native American cemeteries, around which a massive compilation of both academic and legal literature has arisen and legislation and regulations have been drafted (see e.g., Riding In et al. 2004). Contrarily, a dearth of such critical analysis exists related to the protections available to virtually all non-Native American cemeteries. In order to understand the complex interactions of the spaces of the dead with those of the living, an investigation of the history of the cemetery dedication laws of Louisiana and the application of those laws in the jurisprudence follows. In addition, the situation of cemeteries in an urban studies context is also reviewed.

A. New Orleans As a Viable Study Locale for Cemetery Preservation

Louisiana, especially New Orleans, is storied for its cemeteries (see e.g., Gandolfo 1981; Huber 1996; Brock 1999; Arrigo and McElroy 2005; Florence and Florence 2005; LaCoste 2015; Kohouteck 2017; Marina 2017; Brantley 2019).36 While little doubt exists that these spaces

36 Interestingly, though New Orleans’ cemeteries are famous and have been the subject of considerable publication, the majority of that publication, as the sources cited here indicate, has not been critical academic analyses of these sites. Indeed, more often than not, the published sources are more coffee table photo essays than any sort of meaningful historical or cultural analyses. Of further note is perhaps the somewhat ethnocentric nature of this perspective of New Orleans’ cemeteries as significant, as only two of them (St. Louis No. 1 and Metairie) are included in Loren Rhoads’ (2017) recent book, 199 Cemeteries to See Before You Die (or 1% of the total cemeteries to see worldwide).
of death contribute to the allure and the tourist draw of the area (Hotard 2003; Dawdy 2016), they are nonetheless constantly threatened by development. At the point of such threatening encounters, the law and archaeology of cemeteries often comes to the fore in Louisiana. For example, recent chemical plant and pipeline construction in St. James Parish has resulted in a collision of these forces (Mitchell 2020). Other common interactions among development, the law, and archaeology in cemetery contexts in Louisiana include residential development encountering forgotten burial grounds, disaster recovery finding long-lost sites, and transportation projects running headlong into cemeteries (Caldwell and Seidemann 2010a; 2010b; 2010c; 2010d; 2014).

Prior to delving into New Orleans’ cemetery history, an essential consideration of this research must include an examination of the question of whether the specific subject of this analysis—Louisiana, and New Orleans in particular—is so unique with regard to its treatment of cemetery spaces that the research presented here cannot be applied to other localities. This notion of New Orleanian exceptionalism is not new and it pervades the historiographic literature on the city (Adams and Sakakeeny 2019), but it, necessarily, must be considered as a potential variable with impacts on the broader utility of this research (Campanella 2017:306; Lightweis-Goff 2014; Souther 2007).

Thompson’s (2008) general thesis that, while it possesses idiosyncratic attributes, New Orleans is not a per se unique locale, is particularly astute when applied to the city’s

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37 Indeed, as Krist (2015) has recently noted, New Orleans, for at least the past 50 years, has embraced the darker aspects of its history as tourist draws. See also Karlin and Balfour (2012:144) who call New Orleans “something of a city of cemeteries” and consider Lafayette Cemetery No. 1 is one of the “Top Sights” of the Garden District (2012:115) and St. Louis Cemetery No. 1 a “Top Sight” of the Tremé (2012:144); Ochterbeck (2004:62) (classifying the New Orleans cemeteries as a “Must See”); Jordi, et al. (2015:77) (classifying St. Louis Cemetery Nos. 1 and 3 and Lafayette Cemetery No. 1 as “Top Attractions”).
cemeteries. Indeed, New Orleans plugs neatly into the circum-Caribbean tradition for many of its mortuary practices and owes much of the development of its cultural traditions in this regard to pan-Atlantic influences. Thus, from a strictly cemetery perspective, much of the uniqueness of New Orleans is overstated. This overstatement appears to derive from blinders that the public (and especially tourists) wear with regard to the range of mortuary architecture in the city (e.g., Latrobe 1951). A common misconception of New Orleans’ cemeteries is that they all lie above-ground, and that this unique tradition results from the high water table of the city (Upton 1997). While the water table is high and in-ground interments must contend with water in the grave shafts, plenty of in-ground cemeteries exist in the city familiar to Americans from other parts of the country. Indeed, the city’s Jewish cemeteries are all in-ground burial sites, a quality shared with non-Jewish cemeteries such as Holt, portions of Carrollton, and several others (Dedek 2017; Jumonville 2016b).

Based upon the foregoing, New Orleans’ exceptionalism (or lack thereof), especially in the context of this research, is overblown and is not a variable that limits the utility of this research to other places. Certainly in Louisiana writ broadly, the problems and concepts discussed here are applicable outside of New Orleans. Part of the reason for this shared situation is statewide legal continuity—New Orleans, although it has its own cemetery ordinances, is subject to the same general Louisiana cemetery law as everywhere else in the state. This reality is evidenced by the fact that the seminal Louisiana cemetery case—*Humphreys v. Bennett Oil Corp.*—originated outside of New Orleans but was then relied upon by the Louisiana Supreme

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38 It is important to distinguish the perceived cultural uniqueness of New Orleans from such things as its geographical uniqueness. As Colton (2005:2) states, “New Orleans’s site makes it unique,” referring to its geographical location on low-lying land between the Mississippi River and Lake Pontchartrain. However, Colton (2005:2) goes on to note that non-uniqueness of the city in the same sentence by observing that, “how the city dealt with environmental circumstances places it within larger technological and political frameworks.” Indeed, Dawdy (2008), though analyzing the city prior to the period that is the subject of this research, properly situates the culture within its context not so much as unique, but rather simply as an outgrowth of various European imperial actions and interactions with indigenous peoples and Africans in a pan-Atlantic world.
Court in both the *Touro Synagogue* and *Christ Church* cases, all of which are discussed in more
detail in Chapter 5. Moreover, as Kay (1998) notes, the problems of cemetery and development
interactions are national in scope. Because so much of Louisiana cemetery law has analogues
elsewhere in the United States, the analysis and conclusions herein should have broad
applicability elsewhere.

B. Cemeteries in the Urban Studies Literature

In keeping with the idea that, at least as to the matters discussed here, New Orleans is
substantially similar to other United States locales, threats such as those noted above to New
Orleans’ cemeteries importantly are not unusual for historic and cultural resources. For this
reason, various state and federal laws have been enacted since the mid-1960s in an effort to
minimize damage to such sites (*e.g.*, the National Historic Preservation Act of 1966, 54 U.S.C.
300101 *et seq.* [“NHPA”]; the National Environmental Policy Act of 1970, 16 U.S.C. 4321 *et
seq.* [“NEPA”]). Such laws often lack substantial and meaningful site protections (Seidemann
2007). However, cemeteries occupy a liminal legal space when it comes to status and protection
between continuously used sacred spaces (Dymond 1999) and historic or cultural resources that
are the subject of such legislative protections (King 2012; Mahoney 2014).

Long-existing cemetery protections are particularly underreported in the academic
literature related to planning and urban studies worldwide (*e.g.*, Demirakin 2012),
39 despite recent experiences in Louisiana suggesting that the ancient legal concept of an inviolate
cemetery is the strongest protection existing anywhere in the law for historic spaces of any

39 It is important to note that the focus of Demirakin’s research was the use of expropriation power in Turkey to
change the use of cemetery to something else. It is disappointing that his research did not delve into the questions of
what became of the human remains that may have needed to be moved as a result of such expropriations.
kind.\textsuperscript{40} Indeed, in a 1950 publication by the American Society of Planning Officials entitled “Cemeteries in the City Plan,” though “cemetery removal” is contemplated as a manner of managing such spaces in an urban environment, no consideration is given to the sacred nature of this land nor really of what to do with the remains interred therein (Marsh and Gibson 2015). Thus, this review briefly examines cemetery protection and treatment in the existing land use, planning, archaeological, and legal literature.

The ancient concept of the cemetery dedication, at least in Louisiana, has emerged as a stronger site protection tool than the more recent historic preservation legislation reviewed in previous chapters (Seidemann 2018a; 2018b). This tool is an interesting reality, as the latter laws were intended specifically to stem the impacts of development and the looting of cemeteries, while the former was not. The significance of the emergence of the cemetery dedication as a factor in planning and as a historic preservation tool in Louisiana has implications across the United States, as the cemetery dedication is virtually ubiquitous in all fifty states (\textit{e.g.}, Cal.Health \& Safety Code § 8553 [California]; T.C.A., Health \& Safety Code § 711.035 [Texas]). Ultimately, this means that little-known and often underused tools for the protection of sacred spaces may be lurking in existing legal schemes in most jurisdictions and this chapter reviews the history, existence, and usage of such tools in Louisiana.

The existence of such sweeping cemetery protections as the cemetery dedication, though occasionally discussed in legal literature (Tom 2016:185) and appearing a few times per year in the reported jurisprudence in the United States (\textit{e.g.}, Seidemann 2013), does not seem to have

\textsuperscript{40} These experiences derived from the realities of applying the later-enacted cemetery protection laws discussed herein to sites after the discovery of forgotten cemeteries during Hurricane Katrina rebuilding efforts. As was discovered, all such legal concepts have work-arounds that undermine strong protections for cemeteries such as the Unmarked Burials Act’s and the Historic Preservation Act’s requirements for excavation only of human remains that might be disturbed by new construction rather than a requirement to protect all remains within the footprint of a project, regardless of whether they will actually be directly impacted (Caldwell and Seidemann 2010a, 2010b).
permeated much of the non-legal academic literature. Though occasionally sources comment on the generally-accepted notion of the sanctity of the grave (e.g., Worpole 2003:155, 158) or simply note the reality that putting land to a cemetery use places it out of commerce for other purposes (e.g., Canning and Szmigin 2010), scholars seldom look beyond the modern environmental and historic preservation movements for sources of such protections. Another especial shortcoming in the existing literature is in the field of archaeology, where much attention is paid to NAGPRA, but little consideration is given to protections for non-Native burial sites. Baugher and Veit (2014:25-29) typify this dearth when they observe that, before NAGPRA, there was virtually no protection for burial sites from unauthorized plunder and pillage or even from unintended damage. Certainly, as discussed in Chapter 3, NAGPRA was a watershed event in raising the awareness of threats to nontraditional cemeteries in the United States (Seidemann 2010) and perhaps worldwide (Seidemann 2004; 2020), but it provided neither a panacea of protective legislation for all burial sites nor the earliest such protection. As is illustrated by the archival evidence reviewed and analyzed in Chapter 5, and as mentioned in Chapter 1, the cemetery dedication is not a universal fix for the problems of disproportionate treatment of cemetery sites either. Indeed, the cemetery dedication is merely a title cloud that carries great weight for the merchantability of property and the security of title, but it does not act as a deterrent that works on the level of combatting structural violence or other types of disproportionate treatments of disenfranchised peoples. However, as Ander (1986:354) states, a title cloud:

may impair the owner’s ability to convey a marketable title. A buyer may refuse to accept a deed to the encumbered property unless the purchase price is adjusted or the encumbrance is removed. Further, a lender may be reluctant to commit funds in such a transaction.
In other words, title clouds such as the cemetery dedication can impact the legal ability to use the burdened property in a particular way, it can impact the resale value of the property, or it can impact the owner’s ability to obtain financing guaranteed by the property. Accordingly, while such mechanisms may carry great financial weight for property owners and developers, the cemetery dedication is only useful when such individuals are concerned with these fiscal ramifications and know of the presence of a cemetery.

The land used for the interment of the human dead is often an afterthought in planning and development circles unless and until those dead interfere with actual real estate development (Bennett and Davies 2014; Coutts et al. 2011; Klaufus 2014, 2015). Indeed, cemeteries have occupied a binary position from a planning and public health perspective for centuries, on the one hand known as sacred and inviolate spaces and on the other as nuisances and hazards that need to be marginalized and moved (Bennett and Davies 2015). In this regard, the literature is replete with discussions of the historical growth of urban areas and the drive to locate cemeteries at the margins of those areas (e.g., Dedek 2017; Upton 2008:210) and the perceived public health threats of cemeteries when the urban growth reaches these “insidious” locales (e.g., Bennett and Davies 2015; Jenner 2005; Johnson 2006; Kong 2012). Not only are the needs of a community for future burial spaces often not considered at the planning stage, but cemeteries are often expensive and direct hindrances to development.

Admittedly, in many cases, when development encounters human remains or cemeteries, it is unexpected (e.g., Doran 2002; Spott 2010). Especially in rural (or formerly rural) areas, the locations of small family or church burial grounds are not well documented and their markers are often perishable or semi-permanent (e.g., Brown 2016; Yanner and Ybarrola 2003; Sloane 2018).

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41 Important exceptions to this reality have begun to emerge from the planning literature in Scandinavia, where scholars are actively advocating for the incorporation of existing cemeteries into city planning (e.g., Nordh and Evensen 2018; Grabalov and Nordh 2020).
Furthermore, many underprivileged communities were simply afforded no burial space in traditional cemeteries and the evidence of their burial locations has been lost over time (Spott 2010). Consequently, such sites are often encountered only by accident once a development project has begun (Kay 1998) and, as Sloane (2018:129) observes, “…developers have fought with communities about preserving cemeteries in the way of development, with mixed success.” However, such accidental finds are not always the case. There have been well-documented examples of developers or others who are aware of the presence or probable presence of cemeteries in the path of a planned project who simply choose to ignore the problem and deal with any damage after the fact.42

Perhaps the most famous of the impacts of development to Louisiana’s cemeteries is the case of the Protestant Girod Street Cemetery (Dedek 2017). As noted in Chapter 2, Girod Cemetery was located roughly in the area occupied today by the Louisiana Superdome, Champions Square, and the surrounding parking garages. Discussed more fully below, this site was cleared in the 1950s as part of the development of downtown New Orleans. The cemetery was, by the late nineteenth century, largely full and defunct as an operating burial place. A combination of its prime location and unkempt nature led to its being reclaimed for alternative uses in the mid-twentieth century.

Although New Orleans boasts some of the most well-known cemetery reuses (i.e., spaces that were once cemeteries and were later either lawfully [e.g., Girod and the Gates of Mercy Cemetery] or unlawfully [e.g., Charity Hospital Cemetery No. II] put to non-cemetery uses), the city is not alone with such problems. Indeed, New York has recently had problems with

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42 Examples of both good and bad actors encountering cemeteries abound. One example is of a logging company allegedly driving over a historic cemetery in Illinois (Anon. 2017). Another is of developers who paid for the proper archaeological excavations to be done before undertaking a construction project nearby (Rickert 2017). See also, Thomas et al. (2010).
conflicting land uses when, during the construction of a General Services Administration ("GSA") building in Manhattan in 1991, workers unearthed what is now known as the African Burial Ground—the burial location of many first-generation enslaved people in North America (Wright and Hughes 1996; Frohne 2015). Characterized as “one of the most significant unplanned historical, archaeological finds” of its time (Clinton and Jackson 2020), the GSA project resulted in protests over perceived racial biases in the treatment of the dead and considerable additional project expenses for the United States government. Although such high profile cemetery problems have not yet been experienced in Louisiana, the numerous cemetery sites improperly put to alternative uses since statehood in 1812 certainly raise the specter of such potential problems in the future. Indeed, this lack of experience now may be short-lived. The current tension between a plastics maker and descendants of those once enslaved on two plantations in St. James Parish regarding cemetery site access and preservation threatens to become Louisiana’s first such contentious experience (Mitchell 2020). The African Burial Ground project, though difficult, was not without its benefits, including considerable knowledge acquired by the descendant community and a raised awareness of the sensitivities involved in such projects. To this point, Michael Blakey (2010), the African Burial Ground project’s lead bioarchaeologist, characterized the ultimate outcome of what began as an insensitively-informed effort to expeditiously remove human remains from the path of development, following considerable protest and descendant community participation thusly: “[t]he site went from desecration in 1991 to becoming a US National Monument in 2007, representing a successful example of bioarchaeology in the service of a descendant community’s human rights.”

43 C.f., Weiss and Springer’s (2020) continued and unsupported assertions that descendant/scientific collaborations are farces. The African Burial Ground outcome represents a solidly-documented rebuke to such assertions.
More commonly, cemeteries are not completely erased from existence by development. An example of such a space is Historic Highland Cemetery in Baton Rouge. Recent archaeological excavations and historical analyses identified that Highland Cemetery, which is Baton Rouge’s oldest existing European cemetery, contracted from two acres to one-half acre in size since its founding in A.D. 1813 (Seidemann and Kleinpeter 2014). In this situation, a neighborhood simply grew up around the cemetery and slowly encroached onto the graves. The interaction of the cemetery dedication with the history of Highland Cemetery and the threats of development to this space that have caused this space to shrink over the years. The general preservation of that site across its two-century history is particularly important to understanding the difficulties faced when development and cemeteries collide and is instructive of the management of these spaces in other contexts. Accordingly, Highland Cemetery presents an opportunity to examine *de jure* and *de facto* treatment of cemetery property in Louisiana from an archaeological perspective. This examination forms a portion of Chapter 5.

C. The Cemetery Dedication

In terms of strict legal classifications of cemetery land in general, under the law in Louisiana, the purposeful interment of human remains in the ground (or entombment on the ground, as the case may be) creates a legal cloud on a property’s title (Seidemann 2018a; 2018b). This cloud, codified at La. R.S. 8:304-307, is known as the “cemetery dedication.” The cemetery dedication is a common legal concept across the United States and basically stands for the premise that once human remains have been interred in a tract of land that land is, forever, classified as a cemetery and cannot be put to alternative uses (Anon. 1968).

As fully reviewed in Chapter 3, in Louisiana there is a suite of additional laws aimed at protecting and preserving cemeteries. These laws exist across the legal spectrum from the federal
level to the local level. Unlike the preservation and criminal laws reviewed in Chapter 3, when
the Louisiana Cemetery Act was enacted in 1974, the Legislature included in this law the
dedication provisions to ensure the sanctity of cemeteries. These, protections, when properly
applied, appear to represent the strongest legal protections in existence in Louisiana for such
spaces. These provisions have not materially changed since their original enactment. These
statutes provide, in pertinent part, as follows:

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… (La. R.S. 8:304(A)).

*   *   *

Dedication to cemetery purposes pursuant to this title is not invalid as violating
any laws against perpetuities or the suspension of the power of alienation of title
to or use of property but is expressly permitted and shall be deemed to be in
respect for the dead, a provision for the interment of human remains, and a duty to
and for the benefit of the general public (La. R.S. 8:305).

*   *   *

Property dedicated to cemetery purposes shall be held and used exclusively for
cemetery purposes unless and until the dedication is removed from all or any part
of it by judgment of the district court of the parish in which the property is
situated in a proceeding brought by the cemetery authority for that purpose and
upon notice of hearing to the board, and by publication as hereinafter provided,
and proof satisfactory to the court: (1) That no interments were made in or that all
interments have been removed from that portion of the property from which
dedication is sought to be removed; and (2) That the portion of the property from
which dedication is sought to be removed is not being used for interment of
human remains (La. R.S. 8:306(B)).

44 Although La. R.S. 8:307 is a part of the cemetery dedication, it merely contains procedural notice requirements
for the removal of the dedication and is thus not reproduced here.
As noted above, read together, these provisions stand for the proposition that, once human remains are interred in a piece of property, that property is forever dedicated as a cemetery. In addition, such property cannot be put to any use other than a “cemetery use” unless all human remains are removed from the property and a court of competent jurisdiction issues an order removing the dedication.

These strict prohibitions are occasionally in conflict with modern archaeological preferences for preservation of cultural materials and human remains in situ when possible. In other words, using modern archaeological methods, removing only the portion of a site that is to be impacted by development is more advisable (Sharer and Ashmore 1993), leaving the remainder of the archaeological deposits intact for either future excavation or for general preservation. This latter approach presents a much more attractive option for developers when cemetery impacts are unavoidable—remove only what will be impacted, not all human remains in the project area—as such an approach is substantially less expensive to implement. This less invasive approach to mitigating cemetery impacts, while economically and archaeologically advisable, is not legally authorized due to the strict mandates of La. R.S. 8:306(B). Quoted above, this legal provision clearly mandates that once property is dedicated for use as a cemetery, the legal cloud that hangs over that property exists until removed by a court judgment finding that “all interments have been removed” from the property (La. R.S. 8:306). Accordingly, no alternative use of cemetery property can exist until all of the remains have been removed. Whether scientifically or economically preferable, the absolute ban on alternative uses of cemetery property under the cemetery dedication is the mandatory legal manner in which cemeteries must be treated in Louisiana. This mandate is applicable to all property in Louisiana in which human remains are interred based upon the following history of the law itself.
1. The Shallow History of Louisiana Cemetery Dedication Laws

In general, the retroactive application of law is disfavored and often will not be allowed by the courts.\textsuperscript{45} Such a reality is problematic when the bulk of the cemetery regulation laws in the Louisiana, and, indeed in the United States generally, were not enacted until after Jessica Mitford’s 1963 publication of *The American Way of Death* (Sloane 1991:215).\textsuperscript{46}

Indeed, as discussed below, though the concepts undergirding Louisiana’s cemetery dedication laws had existed in the jurisprudence definitively since the 1940 Louisiana Supreme Court case of *Humphreys v. Bennett Oil Corp.*, the actual cemetery dedication statutes were not legislatively-enacted until 1974. In order for such site protections to apply to property without running afoul of the prohibition against retroactivity of laws or otherwise representing a taking of private property by the government,\textsuperscript{47} the protections must predate the interest acquired by the current land owners (or their ancestors-in-title, depending upon their method of property acquisition). From the review above, the cemetery-specific protection laws—NAGPRA (1990), the Unmarked Burials Act (1991), the Historic Cemetery Act (2010), or even perhaps the criminal desecration laws (1950)—clearly do not predate much property ownership in Louisiana. Thus, the key to cemetery protections for those sites located on private property in Louisiana and elsewhere lies in the cemetery dedication—a concept that is particularly ancient in nature.

Although the actual cemetery dedication provisions were enacted in 1974, predating jurisprudence in Louisiana clearly accorded cemeteries some measure of protected status as

\textsuperscript{45} See e.g., *M.J. Farms, Ltd. v. ExxonMobil Corp.*, 2007-2371 (La. 7/1/08), 998 So.2d 16; *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).
\textsuperscript{46} Exceptions to this reality include the prohibition of mineral exploration in cemeteries (now, La. R.S. 8:901), which was enacted in Louisiana in 1940 as a response to the facts elicited in the matter of *Humphreys v. Bennett Oil Corp.*, 179 So. 222 (La. 1940).
\textsuperscript{47} It is noteworthy that, in at least two jurisdictions—Rhode Island (Seidemann 2013:19-20) and Minnesota (National Trust for Historic Preservation 1990)—courts have suggested that it is questionable whether regulation of burial sites on private property is, in fact, a taking under the United States and state constitutions. As noted in Chapter 1, although presented with this issue in the matter of *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), the United States Supreme Court, did not opine on the constitutionality of such laws (Seidemann 2018b).
special spaces. In particular, at least five pre-1974 Louisiana cases stand for the notion that cemeteries are inviolate pieces of property.

In the early case of *Choppin v. LaBranche*, 20 So. 681 (La. 1896), the Louisiana Supreme Court wrestled with the question of whether the use of land for interment somehow disrupted long-accepted concepts of property ownership. This case revolved around the rights of certain people to be interred in a New Orleans tomb and whether later disagreements over tomb ownership rights empowered the title owners of the tomb to disinter those who they no longer wanted buried in their tomb. Although the Court never specifically addressed what is known as the cemetery dedication, its opinion in this case is prescient of disputes later to come when it noted that, “[t]o disturb the mortal remains of those endeared to us in life sometimes becomes the sad duty of the living. But, except in cases of necessity, or for laudable purposes, the sanctity of the grave should be maintained, and the preventive aid of the courts may be invoked for that object.”48 In other words, the Court recognized that disturbance of cemeteries is disfavored, but that when such disturbances must occur, an uninterested arbiter (i.e., a court) has the authority to direct the disturbances. This precise concept is embodied in the current statutory cemetery dedication when those seeking the removal of a dedication must apply to a court for final approval of such a land use alteration.

Ultimately, the *Choppin* court did not specifically classify the type of restriction or right that a cemetery use placed on property in Louisiana. The Court correctly noted that such use did not affect the underlying ownership of the property, but that it also did not create a servitude (easement) in favor of the families of those interred on the property. Nonetheless, the Court sidestepped an actual conclusion as to the nature of the legal classification of such property and instead seemed to hold based upon the general disfavor with the disturbance of the dead that the

48 *Choppin v. LaBranche*, 20 So. 681, 682 (La. 1896).
remains in the disputed tomb could not be disturbed based upon a contract between the tomb owner and its inhabitants (during life). In this regard, the Court was loath to create a species of property right without explicit authorization from the Civil Code. As is set forth below, such a jurisprudential creation is not inconsistent with Louisiana’s civil law system and, had the Choppin court wished, it could have found ample historical support for the notion that interment creates a legal dedication that burdens the underlying (and overlying) property.

The case of Humphreys v. Bennett Oil Corp., 197 So. 222 (La. 1940) represents the worst-case scenario of such interactions between the special nature of cemeteries and the violation of their sanctity. In Humphreys, a mineral production company thought it advisable to sink two oil wells into a rural cemetery in Acadia Parish, Louisiana. When descendants of those interred in the offended cemetery brought suit against the production company for, among other things, mental anguish, the Louisiana Supreme Court reacted harshly, with an uncharacteristically editorial decision. In this decision, the court described the problem in the following manner:

It is admitted that this small Evangeline Cemetery, consisting of a one-acre plot of ground, was literally converted into an oil field by the drilling thereon of two producing wells. By such use, this consecrated ground, which was destined for the peaceful slumber of the dead, was transformed into an industrial site, to be exploited for material gain.... This use of the cemetery plot divested it of its sacred character, violated and profaned the sanctity of the graves. This was a desecration calculated to wound the feelings of the living who had relatives buried there.\(^4\)

From the tone of the decision, the Court clearly did not look favorably upon violations of the cemetery dedication. Although the Court’s rhetoric in this case contains a bit of purple prose, it also presages a judicial reverence for the spaces of the dead. In Humphreys, the Court also explicitly addressed the concept of the cemetery dedication when it stated the following:

\(^{49}\) Humphreys v. Bennett Oil Corp., 197 So. 222, 228 (La. 1940).
Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its character in the minds and feelings of the community. “It assumes a sacred quality that overrides conveyances’ precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors.”\(^{50}\)

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

An interesting caveat to the cemetery dedication as espoused by the Humphreys Court is the notion, taken from Jackson (1936:206), that the cemetery dedication can effectively disappear from a tract of land upon “complete disintegration” of the human remains therein such that “there remains nothing to appeal to the emotions of the survivors.”\(^{51}\) Such an exception to the cemetery dedication is certainly inconsistent with the later-enacted dedication statute, which does not authorize the removal of the dedication protections either upon the disintegration of the human remains or upon the descendant community’s forgetfulness of the cemetery’s existence.

Though likely unintentional, the 1974 dedication laws appear to reflect the archaeological reality of cemeteries: Though surface evidence of a cemetery may disappear and be forgotten, subsurface evidence seldom disappears. Such evidence exists in the form of bone fragments, material culture, and even in mere soil discolorations associated with grave shafts and other cultural activity (Carmack 2002; Rojas-Perez 2015; Springate 2015). Unsurprisingly, Jackson, a lawyer writing in the 1930s, was unaware of such persistent vestiges of cemeteries and human remains when he observed that the dedication may disappear with the disappearance of surface

\(^{50}\) Humphreys v. Bennett Oil Corp., 197 So. 222, 229 (La. 1940) (quoting Jackson 1936:206).

\(^{51}\) Humphreys v. Bennett Oil Corp., 197 So. 222, 229 (La. 1940) (quoting Jackson 1936:206).
evidence of a cemetery. Archaeological inquiries into trace evidence of a cemetery’s existence can fairly be said to have been in its infancy during Jackson’s time and it certainly was not an area of scientific inquiry that influenced the law at that time. Indeed, prior to 1936, the terms “archaeology” and “archeology” appear in only eight reported state and four reported federal cases in the entire United States and none of those cases relate to the practice of archaeology in cemeteries. If the advocacy that led to NAGPRA’s passage and the implementation of similar laws in the past 30 years is any indication, the “emotions of the survivors” are wont to persist around a cemetery site for long after its surface evidence has disappeared (e.g., Herzfeld 2020; Jenkins 2020; McConnaughey 2020).

Because Louisiana’s dedication provisions substantially predated NAGPRA’s passage or even its early drafts (Seidemann 2003; McKeown 2012), the former laws cannot possibly represent a reflection of the incorporation of archaeological knowledge into the law. Rather, these laws seem to have stemmed from a jurisprudential reverence for spaces of the dead and from an aspirational, *de jure*, historical treatment of these spaces. Of further importance to Jackson’s seemingly flippant remark regarding the disappearance of the cemetery dedication, it must be observed that the statement cannot be considered in a vacuum. Indeed, in the same paragraph, Jackson (1936:206) stated that, “[t]he sense of repulsion awakened by a desecration of the grave tends to give permanence to the devotion of land to burial purposes.” With the benefit of nearly 100 years of scientific hindsight, Jackson doubtfully would maintain that cemeteries can disappear from the landscape. Moreover, the entirety of Jackson’s support for the chapter containing this statement is from purely common law jurisdictions, with not one court cited as having held that the cemetery dedication can actually disappear. In other words, this statement is Jackson’s supposition; not a conclusion ever (at that time) held by a court even
outside of Louisiana. Indeed, as is set forth below, the history of the dedication provisions supports a contrary conclusion: Once a cemetery, always a cemetery. Thus, although the Humphreys court took an interesting caveat from Jackson in its opinion, the statement is mere dictum in the court’s decision that does not appear to be supported or followed elsewhere in the history of Louisiana’s cemetery dedication and it is definitely not the case today under Louisiana’s statutory cemetery dedication.52

The proximate result for the litigants of the Humphreys case was less significant than for the protection of cemeteries in general. The Court awarded the anguished families only $6,000.30 in damages (approximately $110,679.20 in 2020). Nonetheless, although the descendants of those buried in the disturbed cemetery in Humphreys did not obtain a windfall judgment, the case is an exemplar of cemetery protections available in Louisiana prior to the enactment of any positive statutory law on the matter.

This type of unsatisfying result in such cases persist today even with the existence of more robust cemetery protection laws than those that existed in 1940. Indeed, in the Jetton situation discussed in Chapter 1, restoration was not a possibility. As noted in Chapter 1, though the individual was arrested and evicted from the property, the damage done was so substantial as to make the restoration of the site impossible. No funds existed for work to remove the overburden or to locate the missing markers. In that case, the community had to settle for a

52 As recently observed by one legal scholar (Stinson 2010:220-221):

Because of the rule-making power judges enjoy under principles of stare decisis, our judicial system depends on understanding what is and what is not a holding. Everyone agrees that subsequent courts are bound only by a prior case’s holding. But too often lawyers argue for, and judges treat, extraneous statements made in a prior case—that is, dicta—as holding. This observation highlights the inherent problem present in the Humphreys case to have non-controlling commentary regarding the ephemeral nature of the cemetery dedication in the published jurisprudence in Louisiana. Though that statement was not intended to be controlling and, indeed, it should not be, there is risk that the disappearing dedication may be picked up by a later court as part of the controlling holding of the case. One potential distinction in Louisiana is that, unlike Stinson’s observation regarding stare decisis, this concept—which establishes the controlling nature of prior legal decisions in a common law jurisdiction—does not exist in Louisiana. Louisiana is governed by the concept of jurisprudence constante which, while similar to stare decisis, allows for judges to depart from prior rulings when the circumstances warrant (Maraist 2019).
commemorative marker on the site containing the names of those known to have been buried at the site.

The cemetery dedication was again reviewed by the Louisiana Supreme Court with regard to the Girod Street Cemetery in *City of New Orleans v. Christ Church Corp.*, 81 So.2d 855 (La. 1955). At issue in the legal part of this case was whether the cemetery dedication is permanent or whether it can be removed. In this case, a curator appointed by the court to represent the interests of the unknown descendants of those interred in the cemetery argued that, when the City of New Orleans sought to expropriate, for the purposes of road expansions and other public works, the property on which the Girod Street Cemetery was located, it could not do so because the land was burdened with a cemetery dedication in perpetuity. The Court in *Christ Church* rejected that argument, again stating that a dedication could be removed, but a particular process must be followed by which to remove the dedication (*i.e.*, removal and reinterment of remains and court judgment approving of the removal). In a particularly poetic conclusion, the *Christ Church* Court held that, the cemetery dedication is not necessarily perpetual and that, if proper procedure is followed, such a restrictive covenant on the property use can be removed. Thus, the Court concluded:

> It was with a prophetic eye that the poet of the day saw the dawning of a great transition period, and so he exclaimed to the world to ring out the old and to ring in the new. The old has been rung out, and the new rung in by keeping in step with progress and development. We cannot allow any determent of expansion by a beating of the living with the bones of the dead.\(^{53}\)

In the matter of *Touro Synagogue v. Goodwill Industries of New Orleans Area, Inc.*, 96 So.2d 29 (La. 1957), the Louisiana Supreme Court was presented with a factual scenario that

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\(^{53}\) *City of New Orleans v. Christ Church Corp.*, 81 So.2d 855, 861 (La. 1955).
directly implicated the cemetery dedication some 17 years before its enactment by the Legislature. The Court recited the following summary of the facts in the Touro case:

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

In the above recitation, it is clear that by 1957 there was in Louisiana a recognized legal concept that property could be dedicated to cemetery purposes and that such a dedication represented a cloud on the property’s title, restricting its use only to cemetery purposes.

The “abandoned cemetery” at the heart of the Touro case was the Gates of Mercy Cemetery, established in 1828 and, according to the reported case facts, last used in 1872. By the time of the Touro Synagogue case in 1957, there had been no interments made in the Gates of Mercy Cemetery in 85 years. Nonetheless, and not surprisingly, the prospective purchaser of the property, Goodwill Industries, was wary of acquiring a cemetery when the purchaser’s planned to use of the property as a facility other than one involved in death care on the site of the former cemetery. As a result of this apprehension, the district court in the Touro Synagogue case acknowledged that Touro and Goodwill entered into a valid contract to sell the abandoned cemetery property, but that such a sale could only be properly consummated if the seller (Touro) funded the disinterment and reinterment (elsewhere) of the remains of those buried in the cemetery.

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On appeal to the Louisiana Supreme Court, the Court was again presented with the question of whether a cemetery could ever be put to a non-cemetery use. The Court answered that question in the affirmative, noting that, consistent with earlier rulings, as long as the human remains had been properly removed from the cemetery property, a cemetery could be decommissioned and the land could be put to an alternative use. Furthermore, the Court found that, because the cemetery had been abandoned (seemingly noted as a vestige of the *Humphreys* case, but certainly not a controlling condition) and because the synagogue was willing to relocate the human remains interred in the cemetery, no prohibition existed on the sale of the property for non-cemetery uses. Moreover, once the remains removal was accomplished, a cemetery dedication no longer burdened the property.

Thus, while the *Humphreys* Court recognized the sacred and generally inviolate nature of cemetery property in 1940, the *Touro Synagogue* Court, in 1957, reaffirmed the unique nature of cemetery property but also acknowledged that cemetery dedications could be removed from property. The *Touro Synagogue* Court noted that as long as certain procedures were followed, such spaces could be converted to another use. Specifically, these procedures were the “proper religious” removal of the human remains interred in the cemetery and their reinterment elsewhere.55

Though not a Supreme Court case, the matter of *Locke v. Lester*, 78 So.2d 14 (La.App. 2 Cir. 1955), reiterates the concept of the cemetery dedication previously established by court

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55 Anecdotal evidence exists that, prior to the advent of modern archaeological methods in the dedication removal process in the 1990s-2000s, much of this “respectful” removal was accomplished with laborers digging up remains under the loose supervision of funeral directors or clergy (e.g., Kretzler 2012). While such an approach may have been reasonably calculated to account for the proper moving of human remains in sturdy burial containers, experience has shown that it was not unusual for human remains to be missed and left behind during these relocation events when the burial containers had broken down and the remains had become mixed with the surrounding matrix. Such a scenario was likely the situation in the *Touro Synagogue* matter, as is evidenced by the post-Hurricane Katrina encounters with human remains at the site of the former Gates of Mercy Cemetery (Caldwell and Seidemann 2010a; Hahn et al. 2017).
decision. This case derived from a boundary dispute between the owners of the Marthaville Cemetery in Natchitoches Parish and an adjacent private landowner. As part of the court’s analysis of the limitations on the use of the cemetery property, the judges reviewed what action is required to effectuate a cemetery dedication, finding that the commitment of human remains to a piece of ground alone is sufficient.\(^{56}\) In this regard, the court in *Locke* stated, “[w]e are of the opinion the reservation of said tract of land for use by the public as a burial ground or cemetery and its continuous use by the general public since it was set apart as a burial ground, is legally sufficient to dedicate said property for public use” *Locke v. Lester*, 78 So.2d 14, 15 (La.App. 2 Cir. 1955).

2. The Deep History of Louisiana’s Cemetery Dedication Laws

Although no legislative history accompanying the enactment of the Louisiana Cemetery Act in 1974 (of which the cemetery dedication is a part) exists, one can reasonably presume that the cases discussed above formed the basis for the modern concept of the cemetery dedication in Louisiana. Finding support for that supposition is essential to ensuring the legally binding nature of the concept of the cemetery dedication. Indeed, such support is necessary in light of the Choppin Court’s reticence to “create law” to modify the Louisiana Civil Code property concepts that remain in force today. To this end, as noted above, portions of the *Choppin*, *Humphreys*, *Christ Church*, and *Touro Synagogue* cases are present in the modern version of the cemetery dedication law. In order to bridge the gap between these cases and titles that may predate them (without requiring a retroactive application of the dedication law), it is necessary to determine whether more ancient versions of the cemetery dedication than 1896 (*Choppin*) exist. The reason for this need is that, among the sources of law in Louisiana are “legislation and custom” (La.  

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\(^{56}\) The potential unintended consequences of such a broad interpretation of the cemetery dedication was addressed by the Louisiana Attorney General in 2010 (Caldwell and Seidemann 2010b). Suffice it to say that the simple death of an individual on a spot certain does not a cemetery make.
C.C. art. 1). The legislative sources of law are easy enough to find—they are enacted and written in some compilation such as the Louisiana Civil Code or the Louisiana Revised Statutes. Clearly, the *Choppin* court did not find the cemetery dedication in any of the legislative sources of Louisiana law. The customary sources of Louisiana law present a more complex problem. According to the Civil Code, “[c]ustom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation” (La. C.C. art. 3). Thus, custom as a source of law must represent a pattern of practice over a period of time and it cannot survive as a source of law if it conflicts with existing legislation.

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

The *Institutes of Justinian* were written in the sixth century as part of the *Corpus Juris Civilis*—a compilation of Roman civil law created at the behest of Emperor Justinian I, with various drafts being completed circa A.D. 534 (Pacia and Pacia 2001). The *Corpus Juris Civilis* is seen as a fundamental source of Roman law, being the formal successor to the prior codifications in the *Twelve Tables* (c. 450 B.C.) and the *Lex Aquilia* (c. 287 B.C.) (Stein 1999). The influence of this Roman law on Louisiana’s Civil Code cannot be understated, leading one
commentator to observe that Louisiana law represents “[t]he living institutes of Justinian” [Pacia and Pacia 2001:39 (quoting Krauss 1992)]. Thus, the presence of positive statements related to the sanctity of cemeteries in the *Institutes of Justinian* is of no small moment in the history of the development of this legal concept as a custom practiced over time in Louisiana. In the *Institutes of Justinian*, Book II, Title I, Articles 8-10 (Moyle 1913), the following is stated as the sixth century Roman law of sacred spaces:

8. Those things are sacred which have been duly consecrated to God by His ministers, such as churches and votive offerings which have been properly dedicated to His service; and these we have by our constitution forbidden to be alienated or pledged, except to redeem captives from bondage. If any one attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred. The ground on which a sacred building is erected remains sacred even after the destruction of the building, as was declared also by Papinian.

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

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

In the above excerpt, the redactors of the *Institutes of Justinian* clearly held out a narrow category of property considered sacred and consecrated. Pursuant to Article 8, consecration can only occur through the actions of “God’s ministers” and can only apply to things “dedicated to
His service.” However, Article 9 appears to hold that the ground in which someone is buried “becomes religious” and, along with other such sacred and religious things listed in Article 10, becomes subject to divine law. Because the sixth century Romans classified burial sites as religious property, with certain restrictions attendant thereto, one can reasonably assume that this early approach to burial grounds as deserving of special treatment represents an ancient version of Louisiana’s cemetery dedication, and, indeed, may be a direct ancestor of the modern concept. This is not to suggest that historic Europeans actually always practiced what they preached. As Iserson (1993:529-533) has noted, history is replete with stories and evidence of the deconsecration and moving of cemeteries since the time of the Institutes of Justinian.

The ancient Roman origins for Louisiana’s cemetery dedication laws are continued in the Spanish law enforced in the state during its early years. Volume 1 of Las Siete Partidas contains the Spanish law regarding cemeteries that was largely the civil law system in effect when the United States acquired Louisiana in 1803 (Yiannopolous 1992). Certainly by the time Spain administered Louisiana (A.D. 1762-1800), the inviolate nature of cemetery property that appears to have originated in Christian Rome or earlier is cemented in the positive codal law. In this regard, Las Siete Partidas contains a prohibition against the use of cemetery property for anything but cemetery uses, thusly: “The churches…enjoy certain privileges and extraordinary exemptions. …[I]t is proper to speak in this Title of the exemptions and privileges which they, as well as their cemeteries, enjoy” (Scott and Burns 2001:166). Explaining that “[a] privilege means a special law,” the redactors of Las Siete Partidas go on to list prohibited activities in churches and cemeteries, including taxation (of the church or cemetery property), resolution of secular disputes, the conduct of criminal proceedings, and trade (Scott and Burns 2001:166). This concept is consistent with the modern principle that dedicated cemetery property cannot be put to
noncemetery uses. Early Spanish law also prohibited the alienation of church (and by extension cemetery) property (Scott and Burns 2001:182-188). Through these protections of cemetery property and prohibitions on the alienation of that property in Roman and Spanish law, one can easily trace the history of the inviolate nature of cemeteries in civil law traditions through the present, and that the antecessors to Louisiana law clearly held such lands as specially protected. Importantly, a review of the early Louisiana Civil Codes (the Digest of 1808 and the 1825 and 1870 Civil Codes) reveals that, from the time that Spanish law was in force in Louisiana until the enactment of the Louisiana Cemetery Act in 1974, no positive codal law existed in Louisiana related to cemeteries.57

Although, as noted above, the retroactive application of law to people’s vested property rights is disfavored, if not outright unconstitutional.58 The fact that cemeteries have been singled out as deserving of special protection as a class of property since at least the sixth century strongly suggests that no current landowner in Louisiana acquired any of his or her property under circumstances in which a cemetery dedication was nonexistent or to which the application of that law would occur.59 Accordingly, requiring that landowners comply with the cemetery dedication in Louisiana regardless of the antiquity of their title or the age of the cemetery on their property is neither unreasonable nor unconstitutional. Of course, Louisiana landowners have not often adhered to such restrictions, leading to the demolition of cemeteries and the reuse of those spaces across the state.

57 Further, the French Napoleonic Code also contains no cemetery-specific laws (though this is probably less important for the purposes of this review, as Louisiana was already an American territory by the time of the enactment of the Napoleonic Code).
58 Of course, just because such rights impingements are disfavored does not mean that they are illegal. Indeed, the United States and Louisiana Constitutions make provision for such activities by requiring that such property owners be provided “just compensation” if their rights are unreasonably restricted by regulation. U.S. Const., Amend. V, XIV; La. Const art. I, sec. 4.
59 See e.g., Narragansett Improvement Co. v. Wheeler, 21 A.3d 430 (R.I. 2011) (a Rhode Island Supreme Court case noting that cemeteries are merely a condition of the property much like a hill or a stream).
In recent years, planning scholars, lawyers, and legislators have apparently looked back only as far as the 1960s when looking for both mechanisms to regulate the protection of cemeteries and for mechanisms to limit the use of certain historically-important property. This myopic approach may seem logical, as the modern environmental movement began in the late 1960s with the primary laws related to the protection of the environment and historic properties enacted in 1970 (NEPA) and 1966 (NHPA), respectively, and the funeral industry came under close scrutiny following the publication of Mitford’s (1963) book (Sloane 1991:215). However, at least in Louisiana, when dealing with cemeteries, the inquiry should apparently be temporally deeper.

Based upon this review, while the object of modern environmental and historic preservation laws may have been to protect sites, cemeteries have apparently never fit well or easily into the modern milieu of such laws (King 2012). The existence of the cemetery dedication makes apparent that perhaps it is unnecessary to attempt to fit a square peg into a round hole to ensure the protection of cemetery sites under the guise of protecting the environment or preserving history. Indeed, the well-known protections afforded by most twentieth century environmental and historic preservation laws are only relative protections at best (Seidemann and Moss 2009). In this regard, while a developer may have to “consider” the impacts of a project on a historic structure or an archaeological site before demolishing that structure or site for historic resources (Seidemann and Moss 2009:454), the developer has no option but to avoid a cemetery or to fully mitigate the impacts to that site in order to be in compliance with the cemetery dedication laws.

Surely, the existence of the cemetery dedication provisions cannot be linked to any effort to temper the effects of structural violence on the disproportionate treatment of certain groups
and their dead. The history of these provisions is too intimately intertwined with basic Christian religious notions to be said to represent a concerted effort to right past wrongs or to provide disenfranchised groups with agency for the protection of their dead and their spaces of death. However, the ability to employ such protections for the same ends as exist in modern laws created to provide such agency cannot be overlooked. The dedication provisions represent actionable legal theories for enfranchised and disenfranchised people alike to create their own agency in the protection of deathscapes and the pairing of such ancient laws with modern archaeological practices and legislative protections creates a strong means for controlling human remains and spaces of death by descendant communities.

From a planning and development perspective, the existence of the dedication provisions means that planners need to pay close attention to the locations of historic cemeteries, whether they are visible on the ground surface or not (the latter scenario presenting its own logistical complexities). The discovery of such sites during the construction process can lead to complete project redesigns or vast cost overages (Kay 1998). Certainly, planners and developers could simply not report the presence of a cemetery and thereby avoid considerable logistical and cost problems. However, experience has shown that, in most cases, whether markers are present in a cemetery or not, someone in the community knows about the existence of the cemetery and will have no qualms about reporting the possible disturbance of the property to the authorities. What this research means for other jurisdictions is perhaps that legal practitioners and preservationists may have been looking in the wrong place when trying to protect cemetery sites. Certainly, Louisiana has been at the forefront for many years in the enactment of specific legislation designed to protect and preserve burial sites. However, while that legislation has accomplished the goal of professionalizing the disinterment process required for the removal of the cemetery
dedication, the protection of the site itself did not necessarily require legislation. Virtually every state in the United States has a concept of the cemetery dedication in its law. While the specific language of any particular law will certainly vary from state to state, a high likelihood exists that stronger and more absolute protections exist for cemeteries in these antiquated and often forgotten enactments.
CHAPTER 5
ARCHIVAL AND ARCHAEOLOGICAL EVIDENCE OF HISTORICAL CEMETERY
AND HUMAN REMAINS TREATMENT IN LOUISIANA

In recent years, archaeological excavations at various sites in New Orleans and Baton Rouge have provided insight into the historical *de facto* treatment of both cemetery sites as well as human remains in Louisiana. Archival evidence, though scant on the topic of cemetery and human remains treatment, also exists in the form of the court records of some of the cases reviewed in previous chapters. These materials provide some insight into the historic treatment of cemetery spaces. This chapter contains reviews of that work and the implications presented therein regarding the treatment of these sites and materials over time, including a consideration of whether structural violence, based upon the evidence reviewed here, played a part in the treatment of these sites.

A. The Available Archival Record

The Louisiana Supreme Court archives are scattered across various locations, including the University of New Orleans’ Earl K. Long Library, the Office of the Clerk of the Louisiana Supreme Court, and the Louisiana State Archives in Baton Rouge. What exists in these materials is a sampling of documents sent to the state’s highest court. In some cases, these materials constitute the complete record of a case from its instigation at the district court, through its appeal and then ultimate review by the Supreme Court. In other cases, the materials in the Supreme Court’s records are more scant, representing just the briefs filed at the high Court and the Court’s decision. The materials available for the cases reviewed here span that range. The two primary cases presented to the Court that touch on questions of the power of the cemetery dedication and the handling of human remains removed when such sites are sought to be moved—the cases regarding Gates of Mercy (*Touro Synagogue*) and the Girod Street Cemetery.
(Christ Church Corp.)—are threadbare. In the case of the Humphreys v. Bennett Oil matter, the litigation that, in 1940, first positively addressed the effect and power of the cemetery dedication laws in Louisiana, the archival situation is considerably different. A trove of materials exists in this collection, including photographs and the trial transcript with testimony from descendants about the treatment of their loved ones’ graves after they learned that an oil company had established a mineral production worksite in a cemetery in Acadia Parish.

1. The Humphreys Archival Record

The Louisiana Supreme Court case of Humphreys v. Bennett Oil Corporation is the only reported case in Louisiana’s jurisprudence in which the cemetery was intentionally damaged during development activities rather than attempts to mitigate harms by seeking court authority prior to undertaking development. In this case, which made it to the Louisiana Supreme Court in 1940 and whose reported decision was reviewed in Chapter 4, late 1930s mineral exploration and production in Acadia Parish resulted in a corporate decision to locate a drilling and production facility directly atop an existing cemetery. Evangeline Cemetery had been first used in the late 1880s or early 1890s by settlers in the Rayne area in southwest Louisiana.60 Thus, while it does not represent a New Orleans example of the interactions of cemeteries and development, its voluminous archival record provides important and scarce insight into the psychological effects on descendants when such destruction occurs. Moreover, the lasting jurisprudential implications of this case continue to ripple through Louisiana law, forming, in part, the basis for later legislation to protect cemetery sites.

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60 The court filings only indicate the cemetery’s location as Township 9 South, Range 2 West, Section 41, in Acadia Parish (Fig. 7). The cemetery does not appear on the 1935 USGS quadrangle map for Branch, Louisiana, and research into well files at the Louisiana Department of Natural History has not revealed a specific location for this site aside from its location in the above-noted, irregularly-shaped USGS section. Thus, the cemetery’s exact location today is unknown.
Filed in Acadia Parish on July 15, 1938, the original petition in this matter establishes that the plaintiffs are family and descendants of those interred in the Quaker Evangeline Cemetery and that the cemetery was damaged in the financial amount of $20,000.00 ($368,678.01 in 2020 dollars) when Frank W. Bennett and later Bennett Oil Corporation “…carried on drilling operations in said cemetery from May 20th, 1937, continuously….“ The plaintiffs further alleged,

[t]hat the defendants, continuously, during repetitive periods of the illegal drilling operations, have, with ruthless and utter disregard of the sacredness of the spot, performed every act in furtherance of a frantic effort on their part to advance their financial ends, to the great mental anguish and heart-rending suffering of your

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61 Louisiana Supreme Court record (hereafter “S.Ct. Rec.”) at 11-12. This case file is contained within the Louisiana Supreme Court records at the Louisiana State Archives in Baton Rouge.
petitioners and others, because of the desecration of the graves of their loved ones….62

At trial, in support of their allegations of cemetery damage and mental anguish, the plaintiffs called several witnesses whose family members were buried in Evangeline Cemetery. Mr. Joseph Chatagnier testified that he and his wife had buried a daughter in the cemetery in 1932 and that the mineral production activity on the site “destroyed” the grave and the beautification work done to it.63 Crucially for the plaintiffs’ case, Mr. Chetagnier had spent his career working in the oil industry and testified to the jury regarding that industry’s best practices and that, even if minerals underlay Evangeline Cemetery, the site did not need to be disturbed (see Figs. 8 and 9 for examples of this disturbance). In this regard, Chetagnier testified in the affirmative to such loaded questions by counsel for the plaintiffs as:

Q: As an experienced oil man could an operator properly keep up a one acre graveyard in which burials had been taking place since 1895, could an operator go into that graveyard one acre, put down two wells, have five boilers and necessary slush pits and necessary roadways in and out, engines, tool room and material stack without desecrating the one acre?64

Chetagnier testified to the complete unnecessary destruction and that directional drilling could have avoided the cemetery entirely. In other words, the plaintiffs used Chetagnier not just to pull on the heartstrings of the jury, but to demonstrate that the oil company, by exercising some discretion, could have avoided damage to the cemetery.

Chetagnier’s wife, Mrs. Celestine Matt Chetagnier, testified to symptoms of anxiety when informed of the industrial operations ongoing in Evangeline Cemetery, stating that, “I never went while they were drilling. I couldn’t stand it. I was nervous.”65

63 Humphreys v. Bennett Oil Corp. trial transcript (hereafter “Humphreys Tr.”) at 15. This transcript is contained within the Louisiana Supreme Court records at the Louisiana State Archives in Baton Rouge.
64 Humphreys Tr. at 17.
65 Humphreys Tr. at 62. See also, Humphreys Tr. at 66.
Figure 8. Imagery of Evangeline Cemetery introduced into the evidence in the Humphreys matter. The photographers of these images are unknown, but the images are dated to June of 1939 in the court record. These images comprise part of the Humphreys case file held at the Louisiana State Archives.
When asked how it made her feel when later she was unable to find her daughter’s grave, Mrs. Chetagnier testified that “…if I would have seen the one that done it I felt like shooting him and it wouldn’t hurt me a bit.”66 On cross-examination, Mrs. Chetagnier doubled down on her feelings of anger and grief in the following exchange with the oil company’s attorney:

Q: It made you very angry[?]  
A: It makes me mad yet.

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66 Humphreys Tr. at 63.
A: It hurt me and when you hurt you do most anything. It made me mad but I wasn’t only mad. I stayed about three months that I couldn’t eat and sleep. To me it was just like the day that she died.

Q: But you were mostly mad[?]

A: I was sorry too.

Q: You wanted to shoot somebody?

A: I felt like it.\(^\text{67}\)

The plaintiffs also called Mrs. E.J. Green as a witness. Mrs. Green testified that she had buried a child in Evangeline Cemetery and that, without her authority, Bennett Oil Company disinterred the child and relocated the remains to another cemetery. In a statement that substantially resonated later with the Louisiana Supreme Court, Mrs. Green testified that “[t]hey took her out and they took the little tomb stone and made steps out of it”\(^\text{68}\) (Fig. 10).

Another witness, Mr. Milo Hunt, a resident of California, came to Louisiana to testify about the state of his father’s grave, which, upon seeing the mineral operations at the site, he characterized as, “[a] scene to make the heart sick, the most abominable thing I ever saw in this United States of America.”\(^\text{69}\) Importantly, as elicited in cross-examination, Hunt admitted that his father’s grave had not been directly impacted by the industrial operation on the site, but that the general impacts to the cemetery, in his mind, constituted a desecration.\(^\text{70}\) This is an important observation anecdotally reported clarified how indirect desecration is perceived as offensive by descendants of those not directly impacted in a cemetery. Indeed, a later witness, Dr. A.C. Wilkins, testified that, in his medical opinion, he believed that the stress of knowing what had

\(^{67}\) Humphreys Tr. at 69.

\(^{68}\) Humphreys Tr. at 73. See also Humphreys v. Bennett Oil Corp., 197 So. 222, 228 (La. 1940).

\(^{69}\) Humphreys Tr. at 32.

\(^{70}\) Humphreys Tr. at 38.
become of the cemetery substantially contributed to his wife’s premature death.71 When asked why he joined as a plaintiff in this lawsuit, Mr. Hunt stated that “[t]he revulsion of feeling that every man who regards a cemetery as a sacred burial place must feel when he knows such conditions exist as were reported to exist”72 at Evangeline Cemetery.

Figure 10. The much-discussed child’s grave marker used as a step to the site office in the Humphreys matter. The photographer of this image is unknown, but the image is dated to June of 1939 in the court record. This image is part of the Humphreys case file held at the Louisiana State Archives.

71 Humphreys Tr. at 82-83.
72 Humphreys Tr. at 43.
The oil company representatives seemed to be largely remorseless for any hurt or harm caused by their actions, ultimately resulting in their loss of this case. More significantly for modern legal protections of cemeteries in Louisiana, this case had an impact on the Louisiana Legislature and the jurisprudence. Within the year, the Louisiana Legislature enacted a law now codified at La. R.S. 8:901. This law, clearly a direct result of the Humphreys litigation, states:

A. It shall be unlawful to use, lease or sell any tract of land which is platted, laid out or dedicated for cemetery purposes and in which human bodies are interred, on any part of such tract, for the purpose of prospecting, drilling or mining; provided that the prohibition of leasing contained in this section shall not apply to any oil, gas, or mineral lease that contains a stipulation forbidding drilling or mining operations upon that portion of the leased premises which is included within the cemetery.

B. Whoever violates this section shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not less than thirty days nor more than six months, or both, and each day during which drilling, mining or prospecting is conducted or prosecuted shall be considered a separate offense.

Very simply, the Humphreys case carved out a special misdemeanor statute that criminalizes mineral exploration and production in cemeteries in Louisiana. This law has been used many times over the years as a deterrent to such activities.

2. The Gates of Mercy Archival Record

In the case of Touro Synagogue v. Goodwill Industries of New Orleans, Inc., 96 So.2d 29 (La. 1957), the archival record makes clear that a curator appointed to represent the interests of the deceased and their unknown descendants worked diligently to upend the transmission of the Gates of Mercy Cemetery property to Goodwill Industries, the latter of which intended to erect a retail facility on the property in Uptown New Orleans. Much of this anemic Supreme Court record revolves around the legal question of whether land dedicated to cemetery uses can be put to other uses by de-dedicating the land. These materials clarify that the representatives of all involved parties (the synagogue, the curator, Goodwill, and the City of New Orleans),
acknowledged that the human remains from this in-ground cemetery established in 1828 must be removed prior to the land’s use as anything but a cemetery. Little detail is provided regarding how this human remains removal would be accomplished aside from a notation that the removal would be overseen by the New Orleans Rabbinical Council and that the remains would be reinterred in Hebrew Rest No. 1 Cemetery in New Orleans. Although the case fails to clarify who would undertake this removal work, the record strongly implies that the removal would be done with little or no meaningful oversight by individuals with intimate knowledge of human skeletal material.\textsuperscript{73} The probable result of such action would be to leave behind substantial amounts of human remains when the bodies are encountered in various stages of decay (Williams 1994; Seidemann and Seidemann 2020), thus meaning that, though legally no longer a cemetery, the space practically continues to contain human dead.\textsuperscript{74}

Although the curator for the Gates of Mercy dead expressed grave concern about the de-dedication of the property, he does not appear to have considered the possibility that many remains may be left behind during any removal and subsequent reuse of the property. Rather, the curator’s focus in this matter is to seek the Supreme Court’s order that a cemetery dedication cannot ever be removed once remains are committed to the ground. Inasmuch as this case preceded the enactment of the Louisiana Cemetery Act and the formal articulation of the cemetery dedication therein, this effort was not unreasonable. Ultimately, however, the Court agreed with the other parties that the land could be made merchantable once the human remains were removed. The Court went further to hold that the removal of the remains would be

\textsuperscript{73} Importantly, unlike some of the other sites discussed in this research (e.g., Charity Hospital Cemetery No. 1 and Locust Grove), there is no newspaper coverage of the Gates of Mercy Cemetery that provides any additional insight into this case.

\textsuperscript{74} See e.g., Seidemann and Seidemann (2020) for a discussion of the logistical and legal problems associated with such a lackadaisical removal of remains.
accomplished at the synagogue’s cost,\textsuperscript{75} but it specified no standards for the removal of those remains.

No transcript for this case has survived, and none of the record evidence presented at the district court is available in these materials. Thus, though the curator refers to communications that he received from several descendants expressing their opposition to the property’s reuse, the \textit{Touro Synagogue} record is not particularly enlightening regarding the impacts of the cemetery’s removal on the descendant community at the individual level. Certainly, the community, through its religious leaders and the court-appointed curator, had agency in this dispute and in the property transaction. However, whether that agency represented the true intentions of the individual community remains unanswered following a review of the available documentary evidence.

3. The Girod Street Cemetery Archival Record

Similarly anemic is the Louisiana Supreme Court record for the dedication removal associated with the Girod Street Protestant Cemetery in New Orleans (“Girod”) in the matter of \textit{City of New Orleans v. Christ Church Corp.}, 81 So.2d 855 (La. 1955). Unlike the Gates of Prayer situation, the trial transcript is available for the Girod matter. However, the transcript is bereft of testimony from but a few descendants, and then only regarding matters of reimbursement for unused grave spaces from the City of New Orleans.

In this case, the city sought to expropriate the Girod property to convert its use to roadways in advance of the construction of, among other things, the United States Post Office building on Loyola Avenue. While the case file contains scant information on the impacts felt by descendants of those interred in the cemetery and even less on the process for removing the remains from the site, the testimony of the city public health officer and a city engineer is

\textsuperscript{75} \textit{Touro Synagogue}, 96 So.2d at 34-35.
insightful with respect to the general treatment of cemetery sites in New Orleans at the time of the lawsuit—the late 1940s and early 1950s.

With specific regard to the disposition of disinterred remains from Girod, the protestant church’s attorney stated on the record that, along with compensation for the land that the city sought to expropriate in this dispute, the church also expected that the city would “…remov[e] and reinter[] elsewhere with perpetual care of all human remains from the cemetery….” Clearly from the record, the church was concerned about disrupted human remains as a result of the road construction and it had certain expectations for the management of those remains. Throughout the record, though, no indication exists regarding what constituted an appropriate removal of these remains. Similarly, though contemporary news reports noted that the remains would be removed from this cemetery that then exhibited a “ghoulish appearance,” no details were provided regarding how this move would be accomplished (Anon. 1954a:1). The record indicates that at least some of the “white remains were reinterred in Hope Mausoleum and those of the Negro dead were removed to Providence Memorial Park” during a two month period in 1957 (Huber and Bernard 1961:83). By inference from other record statements in the Girod matter, many descendants of those interred in the cemetery were apparently notified of the city’s plans to convert the space to an alternative use. One church official interviewed in early 1954 indicated that the Protestant church that owned the cemetery had plans to “…have someone identify the tombs from church records and inscriptions, box the remains found inside, catalog and reinter them in appropriate places…” (Anon. 1954b:7). However, that same article indicates that that work had been planned for many years and was not started at the time of the expropriation suit. Further, an attorney for some of the descendants stated that, “we had received notice in this

76 Trial transcript of Christ Church Corp. v. City of New Orleans, at 2 (hereinafter “Girod Tr.”). This case file is contained within the Louisiana Supreme Court records at the Louisiana State Archives in Baton Rouge.
particular case to remove the remains, which we did, and the remains are now temporarily in a temporary place of abode.” 77 Reflecting a shift in obligations for such activity between the time of this case and the present, the descendants were expected to make arrangements for those remains removed from Girod. Today, the law places the onus on the cemetery authority, landowner, or developer to cover the costs of such removals. 78 Indeed, part of the purpose of the descendants’ presence in the case was to seek “such funds to purchase a new plot and tomb, or, in the alternative, [for the city or church to] furnish us with the tomb or expenses of reinterment.” 79 While some of the descendants made appearances in this case through their own counsel, a court-appointed curator represented most of the Girod dead and their descendants. This curator had no funds for the removal of remains. Although some known descendants had unilaterally undertaken such removals, as evidenced by the above quotation, the lack of a clear funding source for such removals raises a concerning question regarding what became of the remains of those for whom descendants did not speak.

What is particularly interesting in the Girod record is the absence of any meaningful dispute regarding the fate of the cemetery or the human remains contained therein. The predetermined notion of this portion of the litigation is abundantly clear. The parties appeared in court not to dispute the removal of the cemetery, its dedication, or the remains contained within it, but rather they were in court to contest the due compensation for this property reuse.

To be sure, the city made a record of the need for the expropriation of the property. The city’s attorneys called public health experts and planners to establish both the harmful nature of the existing cemetery and the need for that specific property to be used for road construction purposes. However, none of this testimony is particularly directed at justifying the need to move

77 Girod Tr. at 7.
79 Girod Tr. at 7.
a cemetery. Rather, the testimony satisfied the threshold requirement that an expropriation, to be lawful, must be undertaken for a public purpose. The ostensible public purpose here was protection of the health and the safety of travelers on New Orleans’ road system. Any of the implications that this testimony justified the actual need to close and move a cemetery were mere coincidences and asides. This predetermined outcome is apparent from the lack of meaningful opposition to this testimony by the descendants and the curator. That Girod was going to be closed and moved was a fait accompli before the City instigated this suit.

Nonetheless, in order to justify the public purpose of the expropriation, the testimony regarding the condition of the cemetery—especially that elicited from Dr. Walter P. Gardiner, Director of Health, City of New Orleans—is telling of the perspective of many regarding cemeteries at this time. When asked what conditions in the cemetery, “effect[] the health of the City of New Orleans,” Dr. Gardiner testified that the cemetery:

…is in a marked condition of dilapidation; tombs are opened; some of the caskets have been pulled out. There is evidence of vandalism. There’s also evidence all throughout the cemetery where tramps are living in the tombs.80

Dr. Gardiner went on to observe that rats infested the cemetery, and that the site existed as a breeding grounds for mosquitos (Figs. 11 and 12). Seemingly most disturbing to Dr. Gardiner, though, was the presence of those he described as “tramps.” He further testified that:

…with the type of individuals who are using that place as a means of abode, it is quite apparent that they are from a very low type social strata from unknown communities, so that the potential hazard for malaria infestation, and as well as rats, subsequent typhus infestation is very marked.81

80 Girod Tr. at 8.
81 Girod Tr. at 8.
Figures 9 and 12. Historic imagery of Girod Cemetery from the Hogan Jazz Archive, Special Collections, Howard-Tilton Memorial Library, Tulane University. Figure 11 (left) (OPH000404_2) and Figure 12 (right) (OPH000402) were photographed by William Russell in 1956.

From these characterizations, when Dr. Gardiner was asked whether he “consider[ed] all those conditions to render the further use of this area as a cemetery in the condition that it is in a hazard to the health of the City of New Orleans?,”\textsuperscript{82} the doctor stated:

\textsuperscript{82} Girod Tr. at 8.
Well, the answer to that is certainly yes, and the old saying of words fail to adequately describe the scene is definitely applicable in this instance. I think one view of the cemetery will convince anybody that it is of no further use.…

As his subsequent testimony suggests, “one view of the cemetery” may have been the extent of Gardiner’s own forays into the site. Importantly, no questions were asked to either rebut Dr. Gardiner’s sense of the condition and future prospects for the cemetery should it remain as a cemetery. In other words, to the *fait accompli* nature of the judicial decision in this matter, no discussion occurred regarding the possibility of preserving or rehabilitating Girod to abate the identified public health hazards or to continue its use as a functioning cemetery. Indeed, Gardiner volunteered (without prompting) that “the Health Department felt that to restore the cemetery would be such an expensive program that it would be absolutely impracticable, and in no ways feasible.”

Dr. Gardiner’s characterizations of Girod evoke a vivid picture of the place as one of debaseness and possible debauchery; certainly one of festering disease. However, the descendants’ counsel, Sam Roccaforte, initiated a bit of pushback to Dr. Gardiner’s assessment at one point when he pressed Gardiner regarding how closely he had examined the cemetery. Roccaforte’s questioning was not intended to preserve the cemetery, but rather to demonstrate that certain families kept their tombs in better shape than what Gardiner had suggested with his prior testimony. In this regard, Roccaforte stated that “You see, I am representing [a party] who is claiming that they have kept the tomb and plot in excellent condition and shape up until the time they received orders from the Church to remove the remains.” Such better condition, presumably, would lead to higher compensation rates for the expropriation. In answer to this question, Dr. Gardiner equivocated on his prior statement that the entirety of Girod was in a

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83 *Girod* Tr. at 8.
84 *Girod* Tr. at 9.
85 *Girod* Tr. at 12.
dilapidated state and he further noted that “I didn’t go through the place and take a chance of having my clothing torn with vines and crawling over the collapsed tomb.” Such a statement does not particularly instill confidence in Dr. Gardiner’s sweeping assessment of Girod’s condition.

However, by this point, this testimony undoubtedly and substantially affected the court’s thinking regarding the continuation of the site as a cemetery. Indeed, even after Gardiner’s equivocation, the court characterized his testimony thusly:

Well, Doctor, I understand from you you consider the Girod Street Cemetery not only a deserted but an abandoned village, even though it was formerly occupied by the dead, and it has been constantly desecrated by vandals and what not, to the point where it has become a menace to the health and welfare of the City?

Moreover, because the court immediately after that characterization began questioning Gardiner about health risks related to planned development in the area, the testimony clearly had already convinced the court of the unsalvagability of Girod.

The city’s next witness in the Girod matter was the Director of the Planning Commission, Louis Bisso. Mr. Bisso’s frank testimony regarding his perspective on the Girod Street Cemetery provided that:

without any reflection or disrespect on any of the bodies in the graves, since I’m not competent to speak on any of that, we can say that the use of that particular property is incongruous with all the other uses that are within this area.

Clearly, Mr. Bisso testified from a strictly planning perspective—Bisso did not speak to the merits or detriments of the cemetery property, but rather confined his testimony to the problems of routing urban traffic around such a site. This perspective, though, was the other component to the city’s demonstration of the public purpose behind its expropriation of the Girod property and

86 Girod Tr. at 12.
87 Girod Tr. at 13.
88 Girod Tr. at 19.
Bisso demonstrated that purpose well. Bisso made clear to the court that the Girod property was the only available and appropriate property over which to run the roads necessary to develop the Tulane-Gravier/Central Business District area. Again, the *fait accompli* nature of this expropriation is evident in Bisso’s testimony:

**Q:** All right. Now, will you state, or can you state that the route of the proposed street and of the expropriation can not be diverted to any other area without great public loss or inconvenience?

**A:** I would definitely say that any other substitute plan would be in contravention with good planning principles, and the further you go away, the more you attempt to compromise, the more inconvenience, the more possibility of loss of lives, loss of property, and all the other complications that develop when you get away from the smooth expedition, which is the only one we plan to try to fight for.\(^89\)

According to Bisso, the city had one plan for the development of the roads in this area—straight through Girod Street Cemetery—and the alternative to that plan would result in the “loss of lives” and the “loss of property.”\(^90\)

The testimony of the city’s witnesses alone did not condemn the Girod Street Cemetery to the annals of history. Though no such witnesses testified at the trial of this matter, it is apparent from concurrent newspaper articles that not all New Orleanians were dispassionate regarding the fate of Girod. One letter to the editor in 1952 (M.L.H. 1952) lamented that:

> What is happening to the historic Girod Street cemetery sets a bad precedent. The most appalling feature is the way New Orleans now treats the memory of its pioneer dead....In the name of common decency, let the pioneer dead rest in peace.

Oddly, as noted above, several descendants also supported the city’s demolition of the site and testified that the site represented a public health hazard. In this regard, the *pro se* party, Lydia Hollingsworth, testified about the state of the cemetery because she, “was interested...for the

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\(^89\) *Girod* Tr. at 22. This question was asked of Bisso by one of the city’s attorneys, Charles E. Cabibi.  
\(^90\) In this regard, Bisso was commenting that the necessary turns to avoid and leave intact Girod would create hazardous driving conditions in the area that would result in car crashes.
simple reason that my sister was very ill with an incurable disease, and was expected at any time to die.”\textsuperscript{91} Speaking of her experience upon visiting Girod to inquire into the condition of her family’s tomb there, Hollingsworth stated that the cemetery “was in such a deplorable condition that we just couldn’t believe it possible.”\textsuperscript{92} Miss Hollingsworth went on to testify that:

\ldots the sexton said to me, in your tomb it’s all broken. He says there is a metal casket; would I like to see it, and I said, “Horrors, no!” That was my favorite aunt who was buried in there, and he said it was preserved, the body you could see it, but I couldn’t bear to see my sister buried in there.\textsuperscript{93}

Hollingsworth, when asked by the court whether she believed the cemetery to be “abandoned, neglected,” answered “[o]h, frightfully so.”\textsuperscript{94} She rounded out her testimony by asserting that:

\ldots it is only right that the people that are buried there, the heirs, to those should be willing that the City use that of the expropriation so that we can improve our city, but I contend the terrible expense that my sister went to for the doing over of the tomb twice and being broken into, and, of course, the metal casket, and then the expense of having to bury my sister elsewhere because we couldn’t bury her there, I think she should be reimbursed. I don’t care.\textsuperscript{95}

Hollingsworth’s testimony stands in contrast to the general tenor that Huber and Bernard (1961:81) suggest existed among the descendants when they noted that “[m]any people, particularly those whose ancestors had been interred in this place, felt that the church should have continued to keep a sexton on the grounds to maintain the old cemetery.” If any descendants opposed the cemetery’s demolition, no such testimony was presented in the legal proceedings. Moreover, although the court held over Hollingsworth’s questions of compensation to a subsequent trial (a common expropriation practice), it acknowledged Hollingsworth’s testimony regarding the state of the cemetery as part of its analysis of the public purpose of the

\textsuperscript{91} \textit{Girod} Tr. at 72.  
\textsuperscript{92} \textit{Girod} Tr. at 73.  
\textsuperscript{93} \textit{Girod} Tr. at 73.  
\textsuperscript{94} \textit{Girod} Tr. at 74.  
\textsuperscript{95} \textit{Girod} Tr. at 73-74.
expropriation. In this situation, based upon Huber and Bernard’s (1961) assertion, many descendants seemingly were not given voice in this dedication removal process.

The court ultimately approved the expropriation of the Girod Street Cemetery. The record clearly indicates, particularly from statements made by the appointed curator for the dead and their descendants, J. Richard Reuter, Jr., that possibly hundreds of people inquired into their rights in the to-be-demolished cemetery. However, no documentary evidence exists regarding the resolution of these interests or the descendants’ concerns about the treatment of the remains in the cemetery. Reuter mentioned the letters from interested parties only to raise the point to the court that many people would have to be compensated for the expropriation. The court and the parties appeared wholly unconcerned with how the human remains from the site would be handled and how those remains would be disinterred and reinterred. Ultimately, this substantial task merited only a passing mention in any of the surviving documentation and none that provides any insight into the details of the management of these materials. However, if Miss Hollingsworth’s testimony is any indication of the feelings of the descendant community on the demolition of the Girod Street Cemetery, then it seems that the descendants believed that their civic duty recognized the relocation of their ancestors for the betterment of the city.

B. The Available Archaeological Record

For the Gates of Mercy and Girod Street cemeteries, archaeological analyses of the property years later that provide insight suggesting that, though the de jure legal mandates were at least superficially followed at these sites, the de facto cemetery site treatments fall short the law’s requirements. In addition to these sites with both archival and archaeological records, archaeological research has been conducted at the Locust Grove and Charity Hospital Cemetery No. II cemeteries in New Orleans and at Highland Cemetery in Baton Rouge that provide further
de facto insight into the treatment of cemetery sites in Louisiana in the nineteenth and twentieth centuries. No correlative archaeological data exists for Evangeline Cemetery in Acadia Parish, so that site stands on its archival record, which, because the case centered on actual desecration, sufficiently demonstrates the distinction between de jure and de facto cemetery site treatment in Louisiana in the mid-twentieth century.

1. The Gates of Mercy Archaeological Record

On behalf of the Federal Emergency Management Administration, archaeologists from Coastal Environments, Inc., undertook post-Hurricane Katrina archaeological investigations on the property formerly occupied by the Gates of Mercy cemetery in New Orleans (Hahn et al. 2017). In large part, this postmortem analysis of the Gates of Mercy site provided a unique opportunity to assess the efficacy of the legal requirement in the 1950s that all of the human remains from to be removed from the cemetery prior to the removal of its dedication and the reuse of the property for non-cemetery purposes. After Hurricane Katrina ravaged New Orleans in 2005, one site slated for rehabilitation was the Allie Mae Williams Multi-Service Center in the Uptown neighborhood of the city. The structure was partially located on the former Gates of Mercy Cemetery site that was the subject of the above-discussed Touro Synagogue litigation. For this reason, archaeological monitoring, survey, and limited excavation occurred when the original facility’s slab was removed in 2014-2015 to determine what impacts, if any, future work would visit upon the portion of the former Gates of Mercy Cemetery site underlying the original slab.

Because the Touro Synagogue case in the 1950s had removed the cemetery dedication of the Gates of Mercy property, partially under representations that all human remains had been removed from the site, this land had since been put to alternative uses. Thus, any archaeological
findings of human remains, though significant under more recent laws such as the Unmarked Burials Act, have no legal impact on the use of the site and must merely be mitigated to the satisfaction of the Louisiana State Archaeologist (i.e., consistent with archaeological best practices).

The archaeological monitoring and limited surveying and excavation of the Gates of Mercy site resulted from a 2013 finding of “one ex situ, potential human bone [that] was found” by FEMA archaeologists (Hahn et al. 2017:iii, 3). This bone was later identified as “[o]ne human bone fragment” (a possible femoral head) (Hahn et al. 2017:106, 111). The subsequent monitoring, survey, and excavations revealed little to no positive evidence of human remains at this site. The archaeologists working this project cautioned against too broadly interpreting their negative findings, noting that their analysis of the site constituted only 4% of the former cemetery property and that, “[w]hile no identifiable human remains were encountered by the current study, there could well be human remains, both in situ and ex situ, within the remainder of the project area and/or within the site as a whole” (Hahn et al. 2017:iv).

Despite the statement that archaeologists found no human remains at the site, their faunal analysis of materials recovered from the fieldwork, observed that, “[f]ive specimens were recovered that compared favorably to human bone and because the material originates from a cemetery setting, it is highly likely that these fragments are human” (Hahn et al. 2017:148).6 Astutely, Hahn et al. (2017:262-263) observe that “[a]lthough it is possible, it seems unlikely that past disinterment activities were 100 percent successful in recovering all human remains within the cemetery limits.” They further note that “[h]ow rigorous the disinterments were of any burials made in those areas remains an open question” (Hahn et al. 2017:263). Such a reality, coupled with the substantial disclaimer quote above, strongly supports a supposition that the additional fragments included one vertebra and four femoral shaft fragments.

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6 The additional fragments included one vertebra and four femoral shaft fragments.
supervision of remains removal by the Rabbinical Counsel of New Orleans was not to archaeological standards and that any future work on the site must proceed with caution.

2. The Girod Street Cemetery Archaeological Record

Archaeological investigations at the Girod Street Cemetery have been far more opportunistic, sporadic, and uncontrolled than those reported for the Gates of Mercy site. Indeed, in personal communications with Douglas Owsley, formerly a physical anthropologist associated with Louisiana State University, he recounted one road construction project in the 1980s in the vicinity of Girod in which he was given mere hours to observe and salvage any human remains exposed by subsurface activities (Owsley, pers. comm. 2020). The only documentation of any reconnaissance archaeology at the site of this former cemetery comes from a four-page site form (16OR115) completed by Mary Manhein in 1987. In her limited site access to the former Girod property at this time, Manhein identified human bone fragments that she concluded represented an minimum number of individuals (“MNI”) of 100, clearly indicating that the remains removal was less than complete at this site in the mid-twentieth century. Manhein’s finding is even more troubling when considering that Girod was a largely above-ground cemetery, suggesting that the remains should have been easier to identify and remove than those in the entirely in-ground interments of the Gates of Mercy Cemetery. As Manhein correctly notes, the site holds significant potential for future research and should be carefully monitored during any ground disturbances in the area. What is clear from Manhein’s findings is that neither the church nor the City of New Orleans completed a systematic removal of human remains from Girod. Such a conclusion is substantially supported by the minimal testimony in the trial court record in which at least two individuals indicated that they had received notices to remove the remains of their loved ones at their own expense. Presumably, most, if not all, of the remains of those whose
family members did not respond to that call were simply left on the site and were demolished along with the above-ground tombs and constructed over when the city was undertaking its road improvements.

3. The Locust Grove Cemeteries Archaeological Record

The Locust Grove cemeteries in Uptown New Orleans mentioned previously have no court record of a dedication removal. These cemeteries were the subject of archaeological investigations in post-Katrina New Orleans for the purposes of determining whether the land on which they were situated—property later converted to use as a school (Thomy Lafon Elementary)—could again be repurposed using federal funding following the storm (Hahn and McCarthy 2012). The Locust Grove cemeteries served as New Orleans’ pauper cemeteries in the middle portion of the nineteenth century and were overfull by the turn of the twentieth century (Hahn and McCarthy 2012), by which time these sites had been given over in favor of Holt Cemetery as the city’s paupers burial ground (Branyon 1998; Hahn and McCarthy 2012; Seidemann and Halling 2019). At the time that the Locust Grove cemeteries were slated for repurposing as school properties, despite the knowledge that burials existed therein. Indeed, Mayor Martin Behrman indicated as much when he directed by ordinance in 1905 that the land be converted to a school, and that the human remains be removed from the property prior to that conversion (Hahn and McCarthy 2012; Seidemann and Halling 2019). After a city attorney opined that it was permissible to reuse cemetery space, an ordinance issued in 1905 by the City of New Orleans removed the dedication from Locust Grove Cemetery Nos. 1 and 2 and authorized the construction of the Thomy Lafon School on top of them (Hahn and McCarthy 2012). A concurrent ordinance directed the school contractor to “remove with due respect any
remains found in Locust Grove Cemetery No. 1 to Locust Grove Cemetery No. 2.” (New Orleans City Ordinance No. 2945, March 15, 1905).

At the time of Ordinance 2945’s passage, no positive law in Louisiana mandated that a court must approve the removal of a cemetery dedication. In 1905, the legal authority to direct property use (here, Mayor Behrman) provided for the removal of remains prior to the land’s reuse for non-cemetery purposes. Appropriate city officials never actually removed the remains from the Locust Grove cemeteries, as borne out by subsequent archaeological work (Branyon 1998; Hahn and McCarthy 2012). The question remains whether city officials made some effort to undertake at least a symbolic removal of some human remains from the Locust Grove cemeteries so as to show compliance with the ordinance or whether they entirely ignored directive to move the remains. Post-Katrina archaeological work proves that the ground of the former Thomy Lafon School is literally choked with human remains, and that any improvements to this property would impact someone’s burial. However, from a legal perspective, it is probable that it was the thought that counts with regard to the dedication removal at these cemeteries. Today, though the ground of the cemeteries is full of human remains, it is no longer legally a cemetery and any future use of the land merely requires a removal of the remains in the potential impact zone in a manner consistent with modern archaeological practice and subject to a permit from the State Archaeologist under the Unmarked Burials Act.

As with both the Girod Street Cemetery and the Gates of Mercy Cemetery, adherence to the de jure requirements for putting former cemetery property to an alternative use (i.e., the removal of the cemetery dedication) cannot be interpreted as proof-positive that the requirements of that removal were fully accomplished. In each of these instances, substantial evidence

97 A similar scenario played out in the late eighteenth century in New Orleans when King Charles IV decreed the closure and reuse of the St. Peter’s Street Cemetery (Gray 2017).
adduced by modern archaeological inquiries has demonstrated that such de-dedications may have been largely paperwork transactions before the advent of laws such as the Unmarked Burials Act and its mandates to apply archaeological precision to the excavation and removal of burials from a cemetery site.

4. The Charity Hospital Cemetery No. 2 Archaeological Record

New Orleans also presents evidence of cemeteries that were simply ignored in the face of development. Most notable of these cemeteries is Charity Hospital Cemetery No. 2, a site today situated beneath the north end of Canal Boulevard in Mid City New Orleans. The presence of this site underneath the roadway has been long known (Smith and Stone 2014). The cemetery located at this site is, as described by its name, the site of burial for those who died at Charity Hospital in New Orleans. Along with its extant counterpart (Charity Hospital Cemetery No. 1) on Canal Street, Charity Hospital used its Cemetery No. 2 for interments from circa 1849 and 1910 (Godzinski et al. 2008). Charity Hospital sold the property in 1910 for road development, and research indicates that, “except for a reference of Act 119 of the 1904 Louisiana Legislature authorizing the sale of Hospital property, there is no mention at all of the tract being in use for more than a half a century as a cemetery, and at that time containing remains of thousands of burials” (Godzinski et al. 2008:27). Although Beavers et al. (1993) indicated that, though a necessity existed to advertise that burials could be moved from the cemetery, no documentary evidence verifies such a publication (Godzinski et al. 2008). Thus, while Beavers et al.’s (1993) basic assessment of the legal requirements to remove a cemetery dedication appears to be, at least in part, correct for its time, no evidence exists that Charity Hospital, the private developers lobbying for the extension of a major thoroughfare over the cemetery towards Lake Pontchartrain, or the City of New Orleans made any efforts to comply with those laws. Thus,
though the law was known at this time—Mayor Behrman signed the Locust Grove ordinance just
five years prior (and was still in office in 1910)—it was seemingly ignored for Charity Hospital
Cemetery No. 2. Therefore, no compliance with that law in 1910 is evident. Following the
paving of what would later be renamed Canal Boulevard, the collective consciousness of New
Orleans seems to have largely forgotten about the cemetery located thereunder only to be
periodically reminded during road work that invariably disrupts remains. Based upon the work
undertaken by Godzinski et al. (2008) and Smith and Stone (2014), archaeology substantially
altered the treatment of this site in future development from a mere roadway to a cemetery that
must be managed in accordance with the Unmarked Burials Act. In this case, the *de jure*
protections for cemeteries were entirely ignored during the development of Canal Boulevard,
resulting in substantial barriers to development in this area prospectively.

5. The Highland Cemetery Archaeological Record

A final archaeological example of the failure of *de jure* cemetery protections comes from
outside of the New Orleans area. Historic Highland Cemetery ("Highland") is today located on
an approximately half-acre tract along Oxford Avenue in the College Town neighborhood in
Baton Rouge, Louisiana (Coastal Environments, Inc. 1975) (Figs. 13 and 14). Although the
earliest known interment in the cemetery is that of Captain John James Neilson, which occurred
in A.D. 1813 (Thom 2005), documentary evidence of the cemetery’s existence first appears in
the public records in A.D. 1819 when the then-owner of the property, George Garig, donated
“one superficial arpent”98 to the Roman Catholic Church of East Baton Rouge Parish for use as a
cemetery. Although the actual donation did not occur (which represented a formal recognition of

98 Act of Donation from George Garig to the Roman Catholic Church dated June 9, 1819, and recorded as Entry 568
of Judges G Book at page 546 and again in Donation Book C at page 1 (the latter recordation dated April 19, 1827).
The “superficial arpent” refers to an area measurement rather than a linear one (the latter being the original French
use of the term). In early Louisiana, one arpent was the equivalent of 1.262 acres (Darton and Clark 1994:17).
the existence of the cemetery under the law until 1819 [Seidemann 2018a]), the Act of Donation acknowledges the preexisting burial ground when its authors note that the area, “…is fenced in and has been used as a grave yard by the said Roman Catholic Congregation for the purpose of burying their dead for the space of three or four years past….”

Figures 10 and 14. Google Earth imagery modified to show the location of Historic Highland Cemetery in Baton Rouge.

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99 Act of Donation.
Highland Cemetery was expanded by a subsequent property owner, Robert Penny, who added his own “family’s burying ground, which he described as being thirty feet square” (Thom 2005:11), presumably to allow for the burial of his Protestant family outside of the Catholic confines of the existing cemetery space. The Penny addition, based upon the 30-foot description, would only amount to an addition of 0.0007 acres, bringing the total acreage for Highland Cemetery by the time of Penny’s death in A.D. 1825 to 1.263 acres. By 1876, a survey of the area for the heirs of Penny’s successor-in-title to the land surrounding Highland Cemetery shows the cemetery as two acres in size. Thom (2005) provides no explanation for this increase in size nor is there any known indication in the available historical records to explain the increase. However, maps that postdate this time also show a much larger cemetery than the original donation, with some individual graves identified beyond the original boundaries, thus lending credence to the potential expansion. Thom (2005:11-12) notes several other land transactions between 1876 and 1923 that expanded the size of Highland Cemetery. However, it is apparent that this information may be based upon oral history as there is no currently-known documentary support for the expansion.

Highland Cemetery again appears on official survey records in 1923 when the College Town neighborhood was platted. At this time, according to Thom (2005:12) the surveyor, A.C. Mundinger, produced a map dated June 23, 1923, that shows Highland Cemetery as 1.48 acres in area and shaped like a rectangle. However, when Mundinger filed his final plats of the College Town neighborhood on November 23, 1923, the actual dimensions of the cemetery were omitted, leading to continuing problems in the identification of the cemetery boundary to this day. Recordation problems such as this have resulted in known portions of the cemetery being meted out to surrounding landowners over the years and it is unclear what occurred to the burials in
those areas between the 1930s and 1960s (Thom 2005:13). Further, the Catholic Church’s general apathy with the long-term preservation of Highland Cemetery led to further losses of property, including a servitude from the nearby Parker Boulevard and blurred property lines where fences were not maintained.

The last known interment in Highland Cemetery is that of Octavine Favrot in 1939, thus ending more than a century of mortuary activity at the site. Highland Cemetery today exhibits surface evidence of 65 burials (by way of marked graves), but documentary and archaeological evidence suggests that this number is potentially substantially lower than the actual number of those interred in the site (Haley 2003; Kleinpeter and Seidemann 2013; Seidemann and Kleinpeter 2013, 2014; Thom 2005).

In 2018, two excavation units were completed at Highland Cemetery for the purpose of archaeologically verifying, if possible, evidence of definitive encroachment of the surrounding neighborhoods onto burials at the cemetery. In addition to the above-noted Oxford Avenue western boundary, Highland is currently bounded on the south side by the College Town neighborhood, the east by an East Baton Rouge Parish Parks & Recreation Commission (“BREC”) park and the LaHavre neighborhood, and the north by the LaHavre neighborhood (Seidemann 2018c). In addition to the above-noted historic maps that suggest encroachment on the cemetery by the College Town neighborhood beginning sometime in the early 1940s, 2008-2011 probe data from the cemetery indicate that anomalies representing grave shafts extend under the southern wall that now purports to divide the cemetery from the College Town neighborhood (Kleinpeter and Seidemann 2013; Seidemann and Kleinpeter 2013, 2014).

The north side of the cemetery is a bit more problematic for archaeologically evaluating encroachment. Although the LaHavre neighborhood was constructed later than the College Town
neighborhood (c. A.D. 1970s), neither the probe data nor historic maps show any signs of anomalies or graves outside of the modern cemetery fence. Although the cemetery hopefully represented a natural rise in the landscape and the burials were confined to the higher ground (which is now largely contained within the cemetery fence), reality may not have been so simple. The original topography of the LaHavre neighborhood seems to have been lower and swampier than it is today. The area was substantially filled by dredged materials from the creation of the LSU Lakes in the early to middle twentieth century (Thom 2005). If this history is correct, with the nearest LaHavre residence less than 2 meters from the northern cemetery fence, it is possible that additional burials in the lower areas north of the fence (and thus into the LaHavre neighborhood) are now obscured by massive amounts of fill and are beyond the reach of remote sensing technologies.

Using the existing probe map anomalies as a guide, the first excavation area for this project was selected in the southern portion of the cemetery along the cinder block wall that separates the cemetery from College Town. The specific anomaly on the probe map was an area of negative probe returns in the general shape of a partial grave shaft. What this amounts to is an area in which the person using the probe encountered little to no resistance when depressing the probe to its maximum depth of 1m.

This anomaly was wholly contained within the first of two 1x2m units excavated in 2018. This anomaly along the south wall appeared to show only a portion of a grave shaft within the cemetery, with the other portion continuing under the wall and disappearing. The first two arbitrary 10cm levels of this unit were plagued with substantial root intrusion from bushes and vines planted to hide the cinder block wall and from construction materials from the wall itself. Indeed, the material culture recovered from these levels consisted mainly of cement from the
wall, cinder block fragments, some ferrous materials, and some gardening tools. By level three, the material culture dropped off precipitously and a discoloration in a rectangular shape began to emerge in the rough center of the unit, disappearing beneath the wall. Level four was devoid of all material culture. By this level, which bottomed out at roughly 55cm below datum, a clear outline of what can only be described as a human grave shaft was visible within the unit and clearly extended under the wall into the College Town property to the south (Fig. 15). Because the shape of this feature was consistent with other grave shafts encountered at the site, and because no compelling reason justified disturbing the remains likely contained therein, the feature was fully documented and the unit was backfilled. Although it is impossible to state with certainty that human burials exist beyond the southern wall of Highland Cemetery based upon the single excavation unit completed in that area to date, the probable grave shaft feature is strongly suggestive of this likelihood and helps to archaeologically confirm the above-noted suspicions based upon the existing maps of the area.

This excavation provided information useful to the interpretation of the relationship of Historic Highland Cemetery to the broader landscape of the vicinity. Most importantly, the results of the excavation appear to substantially support the encroachment of the College Town neighborhood into the historic boundaries of the cemetery.

The combination of probe and excavation data from Highland Cemetery paint a picture of the treatment of this site during the time between its abandonment as an active burial location (i.e., A.D. 1939) and modern efforts to preserve the site (c. A.D. 1975). The story told by these data strongly suggest that suburban development adversely impacted burials in Highland Cemetery. Such impacts represent violations of the de jure legal protections in place for cemetery sites at the time of these disruptions. Although no positive law representing the
cemetery dedication existed in Louisiana until the year prior to the Highland preservation efforts (i.e., A.D. 1974), as has been discussed at length in prior chapters, jurisprudential protections mandated a certain methodology for reusing cemetery property. The probe and archaeological data from Highland demonstrate either an ignorance or a willful disregard of such mandates when the developers of College Town encroached on the cemetery in the 1940s. The practical reality of this encroachment amounts to clouds on the titles of every landowner along at least the southern boundary of the cemetery.

Figure 11 South facing image of the floor of Level 4, the 1×2 meter excavation unit at 514 N, 502 E at Highland Cemetery in 2018. The dark stain in the rough center of the excavation unit is a probable grave shaft whose north end terminates within the unit and whose south end extends under the fence into the College Town Neighborhood.
C. Discussion

In both the Girod Street Cemetery and the Gates of Mercy cases discussed above, the Humphreys matter was cited for the proposition long held in Western legal traditions that once human remains are interred in a plot of land or entombed thereon, that land is a cemetery in the eyes of the law and shall remain dedicated to that purpose until the dedication is properly removed (Seidemann 2018a; 2018b). Those later cases revolved, in part, around the removal of that dedication. As has been belabored at length in the legal literature (Seidemann 2018a; 2018b), the only proper manner by which to remove a cemetery dedication is by accomplishing two things: (1) removing all human remains from the property; and (2) demonstrating to a court that those remains have been removed and that the land is no longer a cemetery. Both the Gates of Mercy and Girod Street Cemetery cases ultimately resulted in such court orders removing the cemetery dedication. Thus, in those cases, the de jure protections of cemeteries that existed for centuries but that were cemented in Louisiana law by the Humphreys case, were vindicated and the respective courts were convinced that all human remains had been removed from those pieces of property such that they could be put to alternative uses. However, modern archaeological investigations of these tracts of land suggest that, though well-intentioned and seemingly in compliance with the applicable law, these mid-twentieth century efforts to remove all remains from these two cemeteries were less than successful.

The archival and archaeological evidence reviewed here demonstrate several things. First, the existence of de jure protections for certain property does not ensure de facto protection. Moreover, even when superficial evidence of compliance exists with the de jure protections (e.g., the dedication removal efforts at Gates of Mercy, Girod, and Locust Grove), no guarantee exists that such efforts translate to actual de facto protections. However, recent archaeological
work clearly indicates that cemeteries are better protected in Louisiana today than in the recent past. In this regard, the mitigation of cemetery impacts by archaeological means at Charity Hospital Cemetery No. 2 and the decision not to proceed with development at Locust Grove Cemetery Nos. 1 and 2 because of the archaeological requirements of such work are hopeful indicators that *de jure* protections are now equating to *de facto* protections for cemeteries in Louisiana. Finally, the archival evidence related to Evangeline Cemetery supports the notion that cemetery damage on the scale seen in New Orleans causes the type of psychological (and perhaps even physical) damage to descendant communities that rises to the level of Galtung’s (1969) concept of structural violence.
CHAPTER 6
DISCUSSION AND CONCLUSIONS

This purpose of this research has been to examine the treatment of cemetery sites and human remains in Louisiana and how the treatment of those materials and spaces are indicative of the treatment of disenfranchised peoples. This review also examined the extent to which, if at all, recent legislation (particularly, NAGPRA) and evolving archaeological standards influenced and informed such protections. The above reviews of archival and archaeological evidence from the past 80 years has demonstrated that the treatment of cemetery sites and human remains substantially changed over that period. The changes trended from a general disregard for burial places and human remains (e.g., Humphreys) to substantial regulation of such sites and the scientific and respectful treatment of human remains (e.g., Charity Hospital Cemetery No. 2). This trend tracks archaeology’s own history with human remains as Arnold and Jeske (2014:326) note: “the present generation of scholars is atoning for acknowledged discipline-wide abuses of colonialism.” Indeed, when viewed through the analytical lens of structural violence, one can easily conclude that many of New Orleans’ former disenfranchised residents, especially the poor, have experienced unequal treatment in death just as they did in life (Halling and Seidemann 2017; Seidemann and Halling 2019). However, with the advent of modern laws and archaeological standards, additional agency is and has been provided to such groups in ways that enhance their ability to control their postmortem histories.

Considering the foregoing review, definitively connecting all of these changes to the passage by Congress of NAGPRA in 1990 is impossible. Little doubt exists that NAGPRA, as highly-visible federal legislation, represented something of a catalyst for states to implement similar legal protections for human remains and burial sites within their respective jurisdictions.
Moreover, NAGPRA and its progeny has altered the management of cemetery sites as historic and cultural resources by professionalizing their management within archaeological contexts. However, as the extensive congressional record leading to the passage of NAGPRA demonstrates, this law’s passage addresses matters related to providing agency to Native Americans, Native Hawaiians, and Alaska Natives with regard to the repatriation and protection of their ancestors’ human remains (Lannan 1998). NAGPRA’s passage led states like Louisiana to adopt and expand protections with the passage of the Unmarked Burials Act in 1991, though it is probable that such site protections were often tangential afterthoughts to the main thrust of these laws (i.e., human remains).

A. The Cemetery Dedication is a Helpful Site Protection Tool, But it is Fallible

As the review of the cemetery dedication laws demonstrate, most states have had cemetery protection laws in place for decades, if not centuries, prior to the passage of NAGPRA. Thus, some legislators possibly did not see a need for increased cemetery site protections prior to NAGPRA. While definitively linking NAGPRA to a largely modern increase in cemetery and human remains protection in the United States broadly and in Louisiana in particular is not possible, NAGPRA likely provided a framework within which states and descendant communities could begin to address such matters as grave protection and human remains treatment from legal and cultural perspectives.

However, as also noted, a cemetery dedication’s protection, while an important tool for the prospective protection of known cemeteries, is reliant on knowing that a cemetery exists. As Lemke (2020) demonstrated with cemeteries in Texas, identifying the presence of a cemetery, especially one that is the final resting place of disenfranchised people, may be the most difficult task in the process of those sites’ protection. Thus, if a cemetery’s location is unknown or known
but not recorded, the protection of those sites is entirely dependent upon those encountering cemeteries to self-report their findings—a situation that may be contrary to their own land use interests.

Among the enhanced protections for cemetery site preservation in the United States may be mandatory archival reviews such as that undertaken in Texas (Lemke 2020). In this review, the Texas Historical Commission’s Missing Cemeteries Project compared historic and modern maps in the state to identify where once-documented cemeteries disappeared from United States Geological Survey quadrangle maps. Along with additional archival research, numerous previously-forgotten cemeteries in Texas were documented for posterity and protection, the majority of which existed as cemeteries for disenfranchised peoples. Such cartographic regression analyses have also been undertaken in Louisiana in order to verify the locations of enslaved peoples’ cemeteries (Coastal Environments, Inc. 2020a; 2020b). No doubt exists that this sort of research is fruitful for the identification of many such cemeteries. What is unknown is whether these identification efforts meaningfully protect such sites from destruction by most forms of development. As Lemke (2020:606-607) notes, the Texas study’s data were added “to a geographic information system (GIS) database used by professional archaeologists and cultural resource management (CRM) companies in the state….” Louisiana also maintains such a database of site locational information. However, because of the aforementioned concerns about publishing site locations representing invitations to looters such locational data are not readily available in Louisiana (nor apparently in Texas). Thus, the only benefit from documenting these cemetery locations is that when CRM professionals are engaged for a particular project—the vast minority of development projects in the United States—they will be able to benefit from the restricted recordation of such sites in their informing of development. Though such identification
is laudable, as noted in Chapter 4, its utility is substantially hampered without the recordation of such sites in the public conveyance records, thereby placing all on notice of the presence of a cemetery on a particular tract of land.

Since 2008 in Louisiana, this recordation of the cemetery dedication (and the correlative establishment of a cemetery) has been mandated by law (La. R.S. 8:304; La. Acts 2008, No. 423, §1). While important for keeping geographic track of constantly-formed small and family cemeteries, such mandatory recordation is prospective only and does not help to identify or document the thousands of existing cemeteries in the state. Only amendments to various laws mandating the public recordation of existing cemeteries that predate the 2008 amendments either immediately (for known sites) or as they become known (for unknown sites) will make any meaningful difference for the protection of the many cemeteries of disenfranchised people in Louisiana and elsewhere.

The other shortcoming of the cemetery dedication as a site protection tool is the lack of penalties for its violation. No explicit penalties exist in Louisiana law for violating the cemetery dedication laws (La. R.S. 8:304-307). While the Unmarked Burials Act and the Historic Cemetery Act contain substantial penal provisions and the Human Remains Protection and Trafficking Act elevates crimes against human remains to the level of felonies, all that failing to comply with the dedication laws results in is a cloud on the property’s title. Though this burden is not insignificant for landowners and lenders (Curtin 2013) impacting the merchantability of title, the punishment is not a direct deterrent with anything more than financial implications for those who would violate the law. Simply adding criminal sanctions for violations of the cemetery dedication laws would enhance the deterrent significance of these laws greatly.
B. Archaeological Contributions to Cemetery Site Protection

Over the past 50 or so years, archaeological practices and ethical standards substantially developed to a point that the removal of human remains from a cemetery context became a controlled scientific practice that does not resemble the likely haphazard removals that occurred at the Gates of Mercy and Girod Street cemeteries. The practical changes in archaeological excavation techniques in the United States are bolstered by theoretical approaches to interpretation of excavation results, especially those that incorporate multiple perspectives and voices on the past. The combination of these changes substantially altered the nature of archaeological interpretation and practice (see e.g., Preucel and Hodder 1996). Moreover, since the passage of NAGPRA and its state analogues, archaeological methods are employed meaningfully in the removal of human remains from cemetery contexts in advance of development. Thus, in a post-NAGPRA world, much of the human remains removal and relocation in the United States includes such modern archaeological hallmarks as detailed recordkeeping (through field notes, unit floor and profile sketches, and photographs) and collection or excavation proceeds by planned and structured (generally) hand excavation of square or rectangular units (typically of 2x2m, 1x2m, or 1x1m horizontal size) within a metric grid that spans all or part of the site at a pace of arbitrary levels (usually 10cm), interrupted by natural stratigraphy changes that might signal important cultural or geological shifts in site function (Balme and Paterson 2006; McIntosh 1986). The implementation of these modern archaeological techniques in cemetery contexts has shifted the development interactions with these sites from haphazard body and tombstone removal to a controlled, scientific process that incorporates analytical techniques calculated to recover not just the remains, but, through the application of modern archaeological theory, the stories of those who were interred in these sites.
Indeed, according to Wilkie (2005), modern historical archaeology seeks to interpret multiple pasts as seen through the lenses of different participants observed in the archaeological record. Gray (2011:55) has also noted that “identity as an analytical category to be applied to the past” is becoming an increasingly popular method of inquiry. This multivocal approach to archaeological interpretation has enabled historical archaeology to pioneer the use of race-, class-, gender-, and ethnicity-specific perspectives on the past and these perspectives are now brought to bear on cemetery interpretation in ways not heretofore employed. The use of such interpretive methods as applied to cemeteries resulted directly from the placement of most cemetery impacts permitting under the jurisdiction of archaeologists—such changes correlate substantially with the enactment of NAGPRA and its state analogues.

Although some measure of special treatment of cemetery spaces has been present in extant legal traditions for a long time, from a review of the sources in this research modern archaeology has clearly influenced the development of both legal protections as well as notions of what constitutes a cemetery. As seems to be the case in the Gates of Mercy and Girod Street Cemetery scenarios, if a cemetery and its human remains were out of sight, they were also out of mind. In other words, superficially erasing these sites from the landscape by removing visible evidence of their existence sufficiently satisfied the law and perhaps even the descendant communities at the time. Today, modern archaeological methods mandate a higher level of precision in the removal of human remains from a particular site. Simply removing visible evidence of such remains does not suffice for the removal of a cemetery. Moreover, modern archaeological methods have demonstrated that many cemeteries are larger than they appear to be.

100 Such aspirational goals are not always attainable from the available archaeological records. In this regard, Burnston (1997:101) noted of excavations and analyses of enslaved peoples from a Maryland site that “[w]hile historical archaeology has been called the record of the people who had no share in the written past, it must be pointed out that in this case our best efforts archaeologically have told us next to nothing about these peoples themselves, about what mattered to them, nor about their beliefs, values, and aspirations.”
the untrained eye. So many cemeteries contain unmarked graves (Jones 2011) that merely mitigating potential impacts to the known graves is now fairly well accepted to be an insufficient manner of ensuring that a cemetery is fully out of the path of development (Kay 1998). Some amount of archaeological reconnaissance is now required in most situations to ensure that unmarked graves on the periphery of known cemetery sites are not going to be impacted by development before an area can be cleared as a cemetery.

Archaeology and the law that has evolved over the past century has demonstrated that the perspective of those such as Rugg (2000) who characterize cemeteries as ordered constructs is somewhat myopic. In her efforts to classify types of cemetery sites and burial features, Rugg focuses on the regimented nature of such sites as Père Lachaise (Paris) and Mount Auburn (Cambridge, Massachusetts) while ignoring other examples of human burial sites. According to Rugg (2000:260), citing Kolbuszewski (1995), traditional concepts of cemeteries do not include mass body disposal locations such as the site of massacres. However, the reasoning for such exclusion is inconsistent with modern American law as informed by archaeology. These sites, though likely not the locale of interment that would have been chosen by those buried therein, certainly can become imbued with the sacred aspects of traditional cemeteries, both as a space that embodies the suffering leading to the deaths of its inhabitants and as a final resting place of those people. Under the law, such a site would be a cemetery and archaeologically, it could be considered both a burial place and a sacred site.

\[101\] This characterization is not made lightly. Though Rugg is a UK researcher, the scope of her article overtly includes within its classification schemes the United States, Europe, and Australia. While certain of those jurisdictions may have a custom of distinguishing between cemeteries, churchyards, and other burial spaces, Rugg’s (2000:272) suggestion that “cemeteries constitute a particular type of burial space” is inconsistent with law and custom in much of the United States and is certainly incorrect in Louisiana. Indeed, this suggestion is inconsistent with one of Rugg’s earlier publications that defines a cemetery as, “any place in which the dead are buried” (Dunk and Rugg 1994:9). While an effort to classify burial sites for cross-comparative purposes is a laudable goal, caution should be employed to ensure the proper use of terminology as lax standards in this regard could create a legal basis to undermine existing protections.
Such efforts to delineate certain sites as cemeteries and others as “churchyards” or “places of disposal” represents a semantic discussion that does not change the legal or archaeological reality of such land: these places of burial, whether ordered or disordered, are cemeteries. Most modern legal traditions, especially that of Louisiana, provide equally for the protection afforded to such sites as Mount Auburn as to sites such as Charity Hospital Cemetery No. 2. Such inclusive/exclusive semantic discussions threaten what little agency has been provided to disenfranchised descendant communities by threatening to remove from existing protections certain types of deathscapes that do not conform to traditional models. Because these protections often rely on semantic classifications (i.e., what is and what is not a cemetery under the law is crucially important to that site’s protection), such academic parsing of terminology can have real-life detrimental impacts on site preservation and protection (especially when the term “cemetry” is commonly used, at least in the United States, as an inclusive rather than an exclusive legal term).

The futility of such classifications is highlighted through Rugg’s (2000:262) observation that cemeteries (as opposed to other burial sites), “will be divided by roads and paths: each grave will have an established ‘address.’” Archaeology has borne out the fallacy of this ordered notion of places of burial and the law, through such enactments as the Unmarked Burials Act, has followed suit. While some portions of what even Rugg (2000) might consider a cemetery follow these rules, even those (e.g., Oak Cemetery in Fort Smith, Arkansas) contain disorganized sections of unmarked burials with no distinguishing markers or physical “addresses” (Seidemann 2014b). Archaeological investigations into traditional cemeteries have demonstrated the tendency of graves to stray beyond the known boundaries and to defy burial conventions
Moreover, such sites as enslaved peoples cemeteries are no less cemeteries because they do not contained marked graves or internal mapping or order.

Attempts to distinguish among such sites risk undermining the applicability of the legal protections reviewed here. In other words, to create a classification system in which places of interment or entombment are not identified as cemeteries is to strip those spaces of the protections that they have heretofore enjoyed. While a semantic interest in such classifications may exist, the practical legal realities are too risky for site preservation purposes and are inconsistent with modern archaeological notions of what constitutes a cemetery.

C. Structural Violence and the Law’s Role in Cemetery Site Protection

The evolution of theoretical concepts such as structural violence and the application of those concepts in archaeological and bioarchaeological contexts have resulted in a recognition of the social and psychological implications of the mistreatment of cemetery sites and human remains on descendant communities. By no means is this trend of increased scientificization and cultural awareness at an apex. As with any evolutionary process, the treatment of cemeteries and human remains will continue to change in response to external and internal pressures, most likely informed by the increasingly vocal interests of descendant communities.

The legal review contained in this research demonstrates that all of the legislative efforts to enhance the methods for dealing with human remains and cemetery sites have been largely guided by the academic and legal elite. Absent from many of these laws is meaningful or substantial agency for the descendant communities to participate in the process of managing such sites and materials. NAGPRA is a single example of substantial agency provided to the descendant community in burial site and human remains protection legislation. With NAGPRA, the descendant community is a consulting party to such efforts at several stages of the process. In
Louisiana, the only agency provided to the descendant community in the state’s NAGPRA analogues (the Unmarked Burials Act and the Historic Cemetery Act) exists in the provisions that control the ultimate disposition of human remains following their excavation and removal from a cemetery. Greater agency for descendant communities at all levels of the cemetery interaction process is essential for the avoidance of structurally violent acts such as unilateral cemetery destruction and removal. In Louisiana, such agency, within the limits allowed by law, rests with the Legislature to provide.

All of the laws discussed herein operate within the general American limitations on the governmental controls of private property (Wright 2015). To be clear, neither NAGPRA nor its Louisiana analogues represent an absolute ban on the destruction of cemeteries—at least not those on private property. Because of the constitutional protections of private property rights embodied in the Fifth and Fourteenth Amendments to the United States Constitution, whether to repurpose a cemetery located on private land is solely within the discretion of the private property owner.102 Certainly, such repurposing must be accomplished by adherence to the regulatory requirements of the applicable cemetery preservation laws, and no law sanctions a landowner’s destruction of a cemetery. However, United States and Louisiana law permits the legal removal of the sacredness of a cemetery site by way of the removal of human remains and the cemetery dedication (Seidemann 2018a; 2018b). All of this activity can be accomplished without any input from, and indeed over the direct opposition of, descendant communities.

While recent legislative moves at the federal (African-American Burial Grounds Network Act)103 and state (Louisiana Slavery Ancestral Burial Grounds Preservation Commission)104 levels seek mechanisms to provide increased agency to descendant communities of those whose

102 See La. Const. art. I, sec. 4 for the Louisiana analogue to these federal constitutional mandates.
103 H.B. 1179, 116th Congress.
104 H.R. 51, 2018 Louisiana Regular Legislative Session.
cemeteries are most likely to be impacted by development, such efforts are limited by the protections of private property embedded in the applicable constitutions. Unless amended at the constitutional level, descendant community agency powerful enough to supersede a private landowner’s decision to remove a cemetery will never exist under Untied States or Louisiana law. Nonetheless, descendant community agency can be enhanced under existing laws by simply providing such people with input earlier in the cemetery removal process. Such changes can allow for descendant control over the types of narratives created from the moving of their ancestors’ remains by mandating that certain types of scientific testing be done on human remains as part of the removal process or by limiting such testing. Thus, while a comprehensive ban on the moving of cemeteries and human remains is unlikely in the United States under existing law, it is possible for descendant communities to have more control over the narratives that result from such impacts.

There can be little doubt that recent events such as the African Burial Ground project, coupled with increasing agency among underprivileged communities and the rise in consideration of multivocalic archaeologies, have led to the passage of such laws as the Louisiana Human Remains Protection and Control Act. Such laws were specifically enacted to vest law enforcement and descendant communities with the ability to protect and reclaim human remains unlawfully looted from cemetery contexts. Laws such as these, though inspired by NAGPRA, bear little resemblance to their earlier forbearers.

D. Can Louisiana’s Protections Work Elsewhere?

As alluded to in Chapter 1, one of the primary purposes of this dissertation is to determine whether the protections afforded cemeteries in Louisiana would be useful elsewhere
for the protection of such sites. A few examples of the application of Louisiana law to other places follows as hypothetical possibilities of the utility of these protections elsewhere.

Among the many locales that have experienced cemetery damage partially as a result of inadequate legal protections is Dallas, Texas. In the 1940s, highway construction in North Dallas damaged a one-acre (0.4 hectare) portion of the North Dallas Freedman’s Cemetery, an African-American burial ground in use between 1869 and 1907 (Davidson 2007). During this time, there was no positive statutory cemetery dedication in Texas.\(^{105}\) As in Louisiana at his time, however, there was a jurisprudentially-recognized dedication of cemeteries that should have stopped the conversion of the Freedman’s Cemetery to a roadway.\(^{106}\) The law was apparently ignored and, similar to the Evangeline Cemetery in the *Humphreys* matter and the Charity Hospital Cemetery No. 2 situations in Louisiana, the Freedman’s Cemetery was simply converted to a road. In other words, Louisiana’s dedication law, which, until 1974, was also only recognized jurisprudentially, is unlikely to result in any alternative outcome in Texas for the Freedman’s Cemetery. Simply, this law only works when it is recognized and applied.

The outcome of the excavations of the remaining parts of this cemetery in the 1990s may have been different, though, at least from a descendant community perspective, had Texas implemented NAGPRA-style laws as early as did Louisiana. By the time of the road widenings in the 1990s that resulted in the excavation of 1,150 unmarked burials from the Freedman’s Cemetery (Davidson 2007), Louisiana’ Unmarked Burials Act was already in place and provided some measure of agency to descendant communities. Conversely, Texas’ similar law was not enacted until nearly 20 years later (Seidemann 2012), thus leaving the African-American

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\(^{105}\) Indeed, Texas’ statutory cemetery dedication, Tex. Health & Safety Code § 711.035, was not enacted until 1989.  
\(^{106}\) See *e.g.*, *Damon v. State*, 52 S.W.2d 368, 370 (Tex.App. Sec. A 1932) (stating that, “[w]e think no particular instrument or ceremony is required to dedicate a tract of land to cemetery purposes. Its actual use as such is sufficient.”).
community descended from those interred in the Freedman’s Cemetery voiceless with regard to any disinterment, study, and reinterment plans for their ancestors’ remains. Admittedly, even in Louisiana, these descendants today would only have agency with regard to reinterment decisions. However, in practice, since the passage of the Unmarked Burials Act, Louisiana State Archaeologists have made efforts to consult with descendant communities throughout the entire process of development’s interactions with cemeteries. No such equivalent existed in Texas at that time. Thus, from the perspective of descendant agency, whether those descendants are marginalized peoples or not, Louisiana’s law has longer provided for their participation in the management of cemetery site impacts.

Perhaps a more striking example of a scenario in which Louisiana’s cemetery protection laws could have changed the course of a structurally violent episode than the situation in Dallas is the African Burial Ground in New York. Because at the time of the African Burial Ground’s discovery New York had no dedication or unmarked burials statutes in place, even those with the best intentions for that site’s management had no legal guidance or direction. By the 1991 discovery of the African Burial Ground during the construction of the GSA building, Louisiana’s legislature had enacted its Unmarked Burials Act—a law that provides a concise structure for the management of such sites. There is no doubt that, even as Louisiana’s law stands today, it would not have provided the appropriate level of agency to the African-American community in New York. However, the mismanagement of the site would likely have been substantially minimized by the framework of a law that contemplates some consultation with descendant communities. What is most stunning about the African Burial Ground situation in its early days is that the landowners—the United States government—had just months before passed sweeping empowerment legislation for the Native American community in the form of NAGPRA and yet
it pushed ahead with its development plans for the site in a manner that seemingly disregarded
the disenfranchised African-American descendant community. At that time, Louisiana’s law—as
would the law of such states as Missouri and Florida—would have mandated at least some
meaningful consultation by the federal government. Moreover, the Louisiana cemetery
dedication laws, which still do not exist as positive statutory law in New York, would have
mandated a full archaeological excavation of the African Burial Ground or a complete
abandonment of the area containing burials for the GSA building to be constructed in compliance
with the law.

With the foregoing stated, Louisiana law also has far to go in providing meaningful
agency to descendant groups. But again, Louisiana seems to be in the forefront of these efforts.
Following Shell Oil Company’s decision to set aside, preserve, and memorialize the site of a
former enslaved people’s burial ground on its Assumption Parish property in 2018 (McGill
2018), the state representative from that district, Kenneth Brass, recognized that, this event was
unique and that he wanted to ensure similar legislative protections for other enslaved people’s
cemeteries in Louisiana prospectively (Brass, pers. comm. 2018). The result of this event—the
Slavery Ancestral Burial Grounds Preservation Commission—charges the LDOJ with
identifying loopholes in cemetery site protection in Louisiana, especially for the burial sites of
formerly enslaved people. LDOJ has not completed its review as of this writing. However, while
a combination of the existing laws reviewed herein ensures the substantial protection of all
cemetery sites in Louisiana (Seidemann 2014; 2018a), what is still missing is descendant agency.
This agency, in order to combat the landscape structural violence that is so often meted out
disproportionately to disenfranchised peoples’ spaces of death (Seidemann and Halling 2019),
must be provided on the front end of the cemetery protection process. Descendant groups must
have a voice in decisions regarding whether to disrupt a cemetery, how to disrupt a cemetery if that is the ultimate decision, what evaluations will be performed on human remains, and what questions will be asked from those tests.\textsuperscript{107} All of these measures are essential to ensuring the protection and preservation of such sites and the according of proper respect and human dignity to the descendants of those dead.

All of the foregoing changes—legal and archaeological—must today be used to inform planning and development theory and practice. The expansive legal view of cemeteries informed by modern archaeological practice is of particular importance in planning circles (Kay 1998). Problems related to cemeteries and development are particularly acute at the intersections of modern development and former land uses.\textsuperscript{108} As Kay (1998:1) observes:

\begin{quote}
land developments, particularly those on the urban fringe of metropolitan areas, increasingly pressure once-rural cemeteries, small family plots, and unmarked or forgotten burial sites…. Existing urban cemeteries are also in conflict with more intensive land uses that may generate higher tax revenues for cash-strapped municipalities.\textsuperscript{109}
\end{quote}

As Kay (1998:5) notes, the consequences of these interactions of development and cemeteries can have substantial planning, cost, and sometimes even criminal ramifications (see also Harvey 2006). Moreover, the threats to these cultural resources by development are not insignificant and, in many cases (Kay 1998), the adverse impacts of development on cemeteries are meted out

\textsuperscript{107} Indeed, contrary to the assertions made by Weiss and Springer (2020), such decisions cannot and should not be held only by those in the scientific community. Other stakeholders, most importantly descendant communities, are entitled to agency when making such decisions even if such decisions are to place the sanctity of the grave and human remains above the interests of scientific inquiry. Or, as was eloquently noted by Alfred Kroeber when asked if his friend’s, Ishi’s, remains could be anatomized, Kroeber stated “[i]f there is any talk about the interests of science, say for me that science can go to hell” (Shea 2000:49). Descendant groups should have the agency to provide the same response.

\textsuperscript{108} Some portion of the paucity of substantial planning literature on the interaction of cemeteries and planning may be, as proposed by Koonce (2011:40), “a certain level of cultural aversion toward the discussion of burial and death. The unease this topic can evoke may be the culprit behind the lack of planning for these spaces.”

\textsuperscript{109} This idea of forgotten cemeteries was interestingly quantified in a pilot study by Hannon (1990), in which he coined the term, “the forgetting rate,” or the time it should take for an ordinary dead person to be forgotten by the living. This low forgetting rate even in this pilot study provides an probable suggestion for the high number of cemeteries lost over time.
disproportionately on underprivileged groups whose burial sites may represent the nontraditional locales excluded from Rugg’s (2000) definition of a cemetery. Importantly, it is precisely the efforts that led to the passage of NAGPRA and its successors in the 1990s and beyond—public awareness and activism—that represents the largest threat to developers who would run afoul of cemetery protections (e.g., Mitchell 2020). As Kay (1998:7) notes, “Native American protests have stopped or altered the development of such projects as a golf course in the Chicago area, a discount store in California, and a manufacturing facility in Minnesota.” Thus, these sites and a sensitivity to their treatment is an essential part of the planning and development process today.

In many areas, more dead are present than the living (de Sousa 2015). With the suite of laws currently in existence to protect the dead, planners must ensure that historic and prehistoric considerations are undertaken to account for the possibility of impacting cemeteries prior to beginning projects. Moreover, if remains are encountered during development, the penalties for not mitigating such sites are increasingly strong. At the heart of these admonitions is the reality that, in many cases, planners should be collaborating early with members of local communities to ensure that their concerns and desires are considered in the event that cemeteries are encountered during development. Providing this agency to the descendant communities will often pave the way for cooperative mitigation of such sites in the event that they are discovered. Indeed, as Paredes (1997:487) once observed of the agency granted to Native Americans by the passage of NAGPRA:

Through the powerful medium of appeal to the widespread value of “respect for the dead,” American Indians who lobbied so strongly for NAGPRA have forced the larger society to meet native peoples on an equal footing and accord them respect as fully human rather than treating them as objects, as merely the “Other.”

In this way, as J. Anthony Paredes argues, “NAGPRA is not about the dead but about the living” (Paredes 1997:487). Presumably, increased agency provided through recent and proposed burial
protection legislation, both in Louisiana and nationally (e.g., the Slavery Ancestral Burial Grounds Preservation Commission and the African-African Burial Ground Network, respectively), should have similar impacts on other disenfranchised groups.

Indeed, both archaeology and the law appear to be trending in the direction of increasing agency for descendant communities and protection for cemetery sites. Recent examples of these trends are the Society for American Archaeology’s position statements regarding the progress of indigenous and archaeological collaborations in the wake of NAGPRA’s passage (Watkins 2020) and the organization’s support for such legislation as the African-American Burial Ground Network (Preservation Maryland 2019). In Louisiana, such examples are present in the recent passage of the Human Remains Trafficking and Control Act in 2016—a law that provides for strict protection of human remains and provides law enforcement with the authority to stem the illicit trade in such items and to collaborate with descendant communities for the respectful return of misappropriated remains.

Further support for disenfranchised groups’ plight and lack of agency in cemetery and human remains studies is evident from the archaeological establishment’s recent rebuke to the agency-stripping approaches to the study of the past advocated by Weiss and Springer (2020) (e.g., Boutin 2020). Such increased agency and collaboration is essential to the future protection of human remains and cemetery sites. These rebukes are good starting points for increasing black, Indigenous, and people of color’s (‘BIPOC’) agency, but they are not enough. BIPOC agency can be informed by such statements, but must be provided by state and federal legislation to have binding and meaningful effect and local law enforcement must be trained regarding the harms of such lack of agency in order to provide the protections that this research has identified as historically meted out to the deathscapes of the underprivileged.
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