June 12, 2009

Places Worth Saving: A Legal Guide to the Protection of Historic Cemeteries in Louisiana and Recommendations for Additional Protection

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

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I. Introduction

Significant evidence of our shared cultural heritage is fading before our eyes, as a victim to development and other forms of destruction. Among the many historic and archaeological sites threatened today are historic cemeteries. The reason for the current threats to such sites is the poorly understood and very confusing State law regarding the protection for historic cemeteries and the virtual absence of federal legislation on this matter. However, Americans have yet to fully appreciate the decline of such sites, especially historic cemeteries.

Cemeteries are considered by most cultures to be sacred spaces. These spaces contain the physical remains of human beings - generally the ancestors of a community - and are held to be inviolate in nature by many. Admittedly, this inviolate nature of cemeteries may be a belief of fairly recent antiquity in the Western world and human remains do not always win out in the “march of progress” when their final resting places are in the way of the expansion plans of the living. It is precisely this “march of progress” that now threatens these sacred and historically important sites and the protection of these sites is the subject of this paper.

With the constant growth of Western society, many cemeteries are seen as nothing more than valuable property, wasting away beneath concrete blocks and fading superstitions.

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


Developers are too often resulting to demolishing cemeteries altogether or simply removing what they can before they build on top of the remains.\textsuperscript{10} Looters cause other forms of destruction and desecration.\textsuperscript{11} Well-intentioned preservationists, not informed of proper methods of conservation, and without any regulatory control, also cause substantial damage to cemeteries.\textsuperscript{12} On a national level, destruction also occurs in cemeteries due to disrepair and abandonment, where the owners of the land simply overlook the needs of cemeteries, leaving them to the hands of time and Mother Nature, resulting in vandalism and erosion.\textsuperscript{13}

Although developers, looters, and careless owners, are greatly to blame for the problems that our historical cemeteries face,\textsuperscript{14} they are not alone. Lawmakers have generally (likely inadvertently) ignored cemeteries, leaving them without adequate protection and regulation to safeguard them from destruction.\textsuperscript{15} Such protection could come, as it does in many situations in Louisiana, in the form of permitting requirements, laws, and regulations to keep developers at bay and looters away, while giving landowners guidelines to follow for properly restoring the history that rests on and under their property. This protection already exists for cemeteries that fall into specified categories, but many traditional historic cemeteries remain underprotected.\textsuperscript{16}

Nonetheless, there is currently a generally held sanctity for cemeteries in American culture in general and in Louisiana in particular.\textsuperscript{17} It is through the lens of the Louisiana

\textsuperscript{10} Id.
\textsuperscript{11} Mary L. Clark, Treading on Hallowed Ground: Implications for property law and critical theory of land associated with human death and burial, 94 KY. L. J. 487 (2005-2006).
\textsuperscript{12} See, Rachel Witwer (ed.), TOMB IT MAY CONCERN: SAVE OUR CEMETERIES TOUR GUIDE TRAINING MANUAL 44 (Save Our Cemeteries 2008) (commenting on the threats to cemeteries from both development and ill-executed preservation efforts).
\textsuperscript{13} Clark, supra, n.11 at 514.
\textsuperscript{14} Id.
\textsuperscript{15} Clark, supra, n.11 at 530-533.
\textsuperscript{16} See e.g., NAGPRA and the Unmarked Burials Act.
\textsuperscript{17} See generally, Samuel Wilson, Introduction, in Mary L. Christovich, ed., NEW ORLEANS ARCHITECTURE VOLUME III: THE CEMETERIES at ix-x (Pelican Press 1997).
cemeteries that this review is undertaken, though many of the concepts and recommendations herein will be applicable to other jurisdictions.

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

II. Existing Legal Protections for Cemeteries or Lack Thereof
A. Federal Protections

1. National Environmental Policy Act

The role of the National Environmental Policy Act (NEPA) in historic preservation efforts has been documented by numerous other scholars at length, thus, only a brief overview is included here. In a broad sense, NEPA is the gateway legislation for virtually all federal

19 See generally, La. R.S. 8:1, et seq.
environmental and historic preservation legislation. It is through NEPA’s required environmental analyses that such laws as the National Historic Preservation Act (NHPA) finds what little authority it has. One of the major limiting factors of NEPA for use in cemetery protection is that it only applies to federal actions, permits, and expenditures. Thus, if state, local, or private actions, permits, or funding is all that is involved in a project, NEPA (and thus NHPA) does not apply. Regardless, as triggering legislation for the NHPA, NEPA does play an important role in cemetery protection at the federal level.

2. National Historic Preservation Act

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

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

The only requirement of the NHPA is that when federal funding (or via NEPA, federal permitting or actions) is involved in a project, National Register listed and eligible properties must merely be “considered” before the project goes forward. There is no requirement that the project be redesigned to ensure the protection of such sites or even to mandate mitigation of the impacts of such activities to sites. Admittedly, these protections may be bolstered by federal

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23 NEPA, Sec. 101(b) requires “consideration” of historic resources. This provision triggers the NHPA.
24 See generally, Kobylak, supra, n. 21.
26 16 U.S.C. 470(f) (emphasis added).
27 Boyd v. Roland, 789 F.2d 347 (CA 5 1986).
agencies permitting various activities by mandating mitigation or avoidance as a requirement of another permit, but this leaves the protection of sites in the discretion of the federal government, a potentially disappointing prospect.\(^{28}\)

In actual practice, eligible and listed sites are often avoided or mitigated during the course of such projects.\(^{29}\) However, cemeteries occupy a unique position of disregard under the NHPA that makes it more difficult for those interested in their protection to actually protect them.

Under the NHPA, “ordinarily cemeteries...or graves of historical figures...shall not be considered eligible for the National Register.”\(^{30}\) Although King comments, while discussing numerous arguments for how cemeteries may be considered as eligible for National Register listing, that, “[i]f you want a cemetery to be regarded as eligible, you have to be pretty slow to be unable to find a way to make it so.”\(^{31}\) However, in fact, there are very few “traditional” cemeteries listed on the National Register.\(^{32}\)

What, then, is to be done with the isolated, abandoned cemetery\(^{33}\) that does not gain protection from federal laws? This is where the lacuna exists under the federal law that this

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29 Indeed, avoidance and/or mitigation is favored under the NHPA regulations. 36 CFR 800.6(A). *See also*, William L. Want, *The Permit Process*, L. OF WETLANDS REG. 6:72 (2008) (commenting on the costly nature of mitigation and that most projects will make efforts to avoid NR eligible sites to save money).
30 36 CFR 60.4.
31 King, *supra*, n.22 at 81.
32 As of February 4, 2009, only 21 of the 1324 Louisiana sites listed on the National Register were cemeteries (1.6%), excluding even many of the famous New Orleans cemeteries. These data were gathered from the National Register Information System, [http://www.nr.nps.gov/](http://www.nr.nps.gov/), accessed Feb. 4, 2009.
33 A good example of what generally constitutes an isolated or abandoned cemetery is set forth in *Thomas v. Mobley*, to wit:

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

118 So.2d 476, 478 (La.App. 1 Cir. 1960). It would be a misnomer to think, however, that all abandoned cemeteries are necessarily isolated or in rural areas. *See e.g.*, Karen Kruse, *The Parking Lot Cemetery* 32 AGS QUARTERLY 8
paper attempts to address through a review of Louisiana’s cemetery laws. In addition to this lacuna, the minimal protections that actually do exist under federal law are not very helpful.

3. The Native American Graves Protection and Repatriation Act

In 1990, following more than twenty years of lobbying on the part of the Native American community, the United States Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). This piece of legislation set 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 remains. The NAGPRA legislation applies to Native American human remains in two contexts: curated remains housed in museums or other institutional collections that receive federal funding and remains found on federal or tribal lands.

NAGPRA also applies to Native American remains and objects of cultural patrimony discovered on federal and tribal lands. If remains are found on such lands, after the date of enactment, NAGPRA applies. NAGPRA prioritizes the order of the right of possession of such

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36 Native Americans under NAGPRA includes Native Americans, Native Hawaiians, and Alaskan Inuits. 25 U.S.C. 3001.
40 For the purposes of NAGPRA, federal lands means: any land other than tribal lands which are controlled and owned by the United States, including the lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.
items. If lineal descendants can be associated with the items, those individuals hold the primary position of possession.  

However, where direct lineal descendants cannot be identified, a tripartite scheme of possession determination is employed:

A. the ownership shall be “in the Indian tribe...on whose tribal land such objects or remains were discovered;”  

B. the ownership shall be “in the Indian tribe...which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or”  

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

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

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

25 U.S.C. 3001(5). Tribal land means:
(A) all lands within the exterior boundaries of any Indian reservation; (B) all dependant Indian communities; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

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

4. The Archaeological Resources Protection Act of 1979 (ARPA)

The stated purpose of ARPA is, in pertinent part, to “secure...the protection of archaeological resources and sites which are on public lands...”\textsuperscript{49} Many cemeteries are also considered to be archaeological sites to which ARPA would apply.\textsuperscript{50} ARPA is intended to protect against one thing: pothunting.\textsuperscript{51} Congress has identified the threats to such archaeological materials and sites as “their commercial attractiveness”\textsuperscript{52} and inadequate protection from destruction due to “uncontrolled excavations and pillage.”\textsuperscript{53} Thus, although this law may provide some protection for certain cemeteries, its main aim was not to protect cemeteries.

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\textsuperscript{47} Such remains are covered in 25 U.S.C. 3002(a), discussed supra.
\textsuperscript{49} 16 U.S.C. 470aa(b).
\textsuperscript{52} 16 U.S.C. 470aa(a)(2).
\textsuperscript{53} 16 U.S.C. 470aa(a)(3).
The regulations promulgated under ARPA require activities that will impact archaeological sites on federal lands to be undertaken pursuant to a permit process.\textsuperscript{54} The regulations for ARPA are limited, however, in their potential application to historic cemeteries: the archaeological site to be protected must be older than 100 years in order to trigger ARPA.\textsuperscript{55} Although this will likely catch many historic cemetery sites,\textsuperscript{56} it is possible that some such cemeteries are less than 100 years old or that portions of older cemeteries are not yet 100 years old, thus calling into question the applicability of ARPA to the entire site.\textsuperscript{57} Nonetheless, what protections may exist under ARPA are subject to the permitting of the federal government and do not necessitate further discussion here.

5. Section 4(f)

In addition to NEPA and the NHPA, Congress has enacted special preservation legislation for situations when federal road construction is involved.\textsuperscript{58} Known as “Section 4(f),” the parks and historic preservation provisions of the Federal-Aid Highways Act has been famously used to prevent the federal government from developing a highway through a beloved Memphis park.\textsuperscript{59} However, no reported case exists on the effectiveness of this Act in cemetery preservation. Despite this lack of a judicial test, the plain language of Section 4(f), codified at 23 U.S.C. 138, does provide some hope that cemeteries may be protected from federal projects by the law, to wit:

\textsuperscript{54} King, supra, n.22 at 197.
\textsuperscript{55} 43 CFR 7.3(a).
\textsuperscript{56} Prehistoric cemeteries are less of a concern for protection under ARPA since the passage of NAGPRA in 1990, which will apply to most (if not all) prehistoric cemeteries on federal and tribal land in the United States.
\textsuperscript{57} It is important to note that the national cemeteries, which are often classified as federal land, are likely not in jeopardy of being destroyed due to the fact that interments still occur on these properties, which contain many burials that are more than 100 years old. Activities in and management of these cemeteries are specifically provided for by law such that there is little room for disturbance of the national cemeteries. See, 38 U.S.C. 2400, et seq. (establishing the National Cemetery Administration within the Department of Veterans Affairs).
…the Secretary [of the U.S. Department of Transportation] shall not approve any program or project…which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use...  

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

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

Unfortunately, Section 4(f) is of limited utility for cemetery protection and preservation. As Olesh correctly notes, the strong language of Section 4(f) has been undermined and weakened by the courts and the federal agencies. Further complicating the utility of Section 4(f) for cemetery preservation is the reality that it only applies to federal road projects. Thus, state and local projects do not trigger the protections of Section 4(f), nor do the emerging threats from private development.

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63 See generally, Olesh, supra, n.61.
B. State Protections

At the State level in Louisiana, the laws that deal with cemeteries are contained in Title 8, Title 14, and Title 41 of the Revised Statutes. According to Title 8, a cemetery is defined as a place used or intended to be used for the interment of the human dead. It includes a burial park, for earth interments; or a mausoleum, for vault or crypt interments; or a columbarium or scattering garden, for cinerary interments; or a combination of one or more of these.65

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

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

1. Louisiana Cemetery Board

The Louisiana Cemetery Board (“LCB”) was originally established through Act 417 of the 1974 Louisiana Legislature. The LCB consists of seven members, appointed by the

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65 La. R.S. 8:1(7).
66 La. R.S. 8:1(2).
69 La. R.S. 41:1601, et seq.
Governor and approved by the Senate, including a member from each public service commission district, and meets at least two times per year.\textsuperscript{71}

The LCB is responsible for licensing cemetery authorities, cemetery sales, and management organizations, as well as, registering or cataloging exempt authorities.\textsuperscript{72} The LCB also monitors multiple funds as well as provides assistance to consumers through handling of inquiries on information and mediation of consumer complaints.\textsuperscript{73}

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

If at any time the LCB finds that a licensed cemetery is not being managed or operated in proper order, it may choose to suspend or revoke the certificate of authority as well as institute legal proceedings to deny the right of operation and business for that cemetery.\textsuperscript{78} As an

\textsuperscript{71} La. R.S. 8:61.
\textsuperscript{72} La. R.S. 8:61, \textit{et seq.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} La. R.S. 8:72.
\textsuperscript{75} La. R.S. 8:70.
\textsuperscript{76} La. R.S. 8:71.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} La. R.S. 8:75; \textit{see also, Restlawn Park Cemetery, Inc. v. Louisiana Cemetery Board}, 611 So.2d 835 (La.App. 4 Cir. 1992); \textit{State of Louisiana and the Louisiana Cemetery Board v. Twin Cities Memorial Gardens, Inc.}, 43,568 (La.App. 2 Cir. 9/17/08) 997 So.2d 16. In both of these cases, the LCB’s authority to shut down cemeteries operating in violation of Title 8 was roundly rejected. However, new legislation enacted in 2008, specifically, Act 541, has clearly given the LCB authority to so act, a fact that was recognized by the Second Circuit. \textit{Twin Cities, supra}, at 11.
alternative punishment, the LCB may impose a fine in the amount of up to ten thousand dollars for each violation, upon the certificate holder.\textsuperscript{79}

The LCB also maintains regulations for the sale or transfer of ownership over a cemetery by requiring that the original owner return its certificate of authority within thirty days of the transaction, at which time it loses its authority.\textsuperscript{80} The new owner must submit an application for certificate of authority during that time, for which the LCB will follow the same steps as discussed for issuance of the certificate.\textsuperscript{81}

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

2. **Title 8\textsuperscript{83} and Historic Preservation – Existing Protections and their Problems**

Aside from the LCB’s regulatory duties over operating cemeteries in Louisiana, there are some portions of Title 8 that constitute what would be considered historic preservation laws. Although the LCB has the authority to enforce all of Title 8,\textsuperscript{84} it is doubtful that a board charged with industry regulation is the proper entity to exercise this authority. It is simply not the bailiwick of the LCB to be involved in historic preservation – its main charge is industry regulation and it is not equipped to handle historic preservation matters as well. That said, until

\textsuperscript{79} Id.
\textsuperscript{80} La. R.S. 8:76.
\textsuperscript{81} Id.
\textsuperscript{82} See e.g., Letter from Ryan M. Seidemann, Assistant Attorney General, Louisiana Department of Justice to Reverend Donovan J. Labbé, St. Nicholas Catholic Church (4/16/2007) (on file with authors).
\textsuperscript{83} Reference to Title 8 from this point forward is exclusive of the Louisiana Unmarked Human Burial Sites Preservation Act (“Unmarked Burials Act”), which is referred to specifically as the Unmarked Burials Act where appropriate.
\textsuperscript{84} La. R.S. 8:69.
legislative changes, the LCB, through the Attorney General, has this charge and the relevant provisions are worth reviewing.

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

Abandonment and demolition of cemetery spaces are considered in La. R.S. 8:308. As to abandonment, there are two different sets of rules. In parishes with a population that exceeds 500,000, La. R.S. 8:308(B) applies to abandonment procedures. Other parishes are bound by the rules relating to abandonment in La. R.S. 8:308(C). The major difference between these two provisions is the amount of time that must elapse before a cemetery space may be considered abandoned. Under La. R.S. 8:308(B), the time is ten years; under La. R.S. 8:308(C), the time is twenty-five years. Presumably, thought it is not articulated anywhere, this statute was divided by population size with a reality in mind that larger population centers may have a need to reuse cemetery spaces more often (i.e., they would need a higher turn-over rate) than rural areas based on sheer numbers of people dying within those jurisdictions.\(^{85}\) Interestingly, the shorter duration for abandonment in the high population parishes is limited in La. R.S. 8:308(B) to municipal, religious, and nonprofit cemeteries. It is likely that this degree of specificity in La. R.S. 8:308(B) was intended to exclude private, for-profit cemeteries from the shorter abandonment period, even in the larger population areas. As to the process for declaring a cemetery space abandoned, the rules set forth in La. R.S. 8:308(B) and (C) are fairly straightforward. Under La. R.S. 8:308(B), in parishes of 500,000 or more, a cemetery space may be deemed abandoned and

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\(^{85}\) It should be noted that, though the thought of it may be abhorrent to some, the reuse of grave spaces is permitted by law in Louisiana. *See e.g.*, La. R.S. 8:1(36.1), La. R.S. 8:659, and La. R.S. 8:660. This practice, at least in the southern part of the State, was inherited from our ancestors on the European continent when cemetery spaces were at a premium and concepts related to the inviolate nature of those spaces were more lax than they are today. *See e.g.*, Ken Worpole, LAST LANDSCAPES: THE ARCHITECTURE OF THE CEMETERY IN THE WEST at 65 (Reaktion Books 2003) (discussing the problems of overcrowding in traditional European graveyards).
resold if it has been abandoned-in-fact for more than ten years.\footnote{The reselling can only be done after advertising the intent to sell in the official journal. La. R.S. 8:308(B).} All other cemetery spaces in the State must be abandoned-in-fact for more than twenty-five years, during which time “diligent efforts” must be made to locate the successors of the deceased before a resale can occur.\footnote{La. R.S. 8:308(C).} Alternatively, if a space has been abandoned for twenty-five years when the “diligent efforts” begin, the cemetery authority need only make such diligent efforts for one year and make the necessary advertisements required of La. R.S. 8:308(C). It is important to note that the provisions of La. R.S. 8:308 do not allow the time-delays to be truncated because a space has been abandoned-in-fact for the requisite number of years. The time-delays run from compliance with the notice requirements.\footnote{In addition, because of the unique nature of cemeteries in Louisiana property law, it is doubtful that the Civil Code rules on property abandonment do not apply to cemeteries.}

Based on the language in La. R.S. 8:308(A), it is apparent that the abandonment rules apply to any party, natural or juridical, that is covered by the definition of a “cemetery authority.”\footnote{“Cemetery authority” is defined in La. R.S. 8:1(9) as, any person, firm, corporation, limited liability company, trustee, partnership, association or municipality owning, operating, controlling or managing a cemetery or holding lands within this state for interment purposes. With the inclusion of the terms “operating”, “controlling”, and “managing” and with the phrase “for interment purposes, it is clear that cemetery authority refers only to cemeteries that are actively operating and not those that operated at one time and are now abandoned or otherwise closed.} Basically, this refers to any entity that runs a cemetery in the State.

Before reaching a discussion of the portions of Title 8 that deal with repair and renovation of cemetery spaces, it is important to note that La. R.S. 8:308(B) clearly states that abandoned cemetery spaces may not be demolished. It is unclear why this restriction is not contained within La. R.S. 8:308(C), but this omission is likely of little import, as demolition is strictly prohibited under La. R.S. 8:903, irrespective of population size of the parish in which the cemetery is located.
b. Restoration of Specific Grave Spaces in Regulated Cemeteries II: La. R.S. 8:903 and La. R.S. 8:903.1

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

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

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

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90 This reality has been documented by numerous authors and has been substantially exacerbated by the destruction wrought by Hurricanes Katrina and Rita. See, Ryan M. Seidemann, Sisters of Destruction: The Effects of Hurricanes Katrina and Rita on Louisiana’s Cemeteries, 1(3) EPIPHAS 22 (2006).
91 See e.g., Letter to Labbe, supra, n.82.
92 See e.g., David Foil, Old Highland Cemetery Has New Look, STATE TIMES (5/30/73), reprinted in Evelyn M. Thom, HIGHLAND CEMETERY PRESERVED!, 78 (2005) (noting additions to earlynineteenth century cemetery during beautification efforts that were not part of the cemetery’s original plan).
93 Emphasis added.
94 This opinion is supported by some old Louisiana jurisprudence, in which the courts seemed to recognize that cemetery spaces were not to be destroyed. See e.g., Metairie Cemetery Ass’n v. Board of Assessors, 37 La.Ann. 32 (La. 1885).
The foregoing analysis of demolition relates to the power of cemetery authorities, not to the actual descendants/owners of the spaces themselves.\textsuperscript{95} Although repair and renovation should be the favored approach to dealing with derelict cemetery spaces, the law does not provide for any prohibition against descendants or space owners from demolishing a cemetery space, provided that the remains therein are properly cared for in accordance with Title 8.\textsuperscript{96} A cautionary note is warranted here. For older cemetery spaces, the descendants of those interred therein may be numerous.\textsuperscript{97} It is possible that demolition of a space by less than the entirety of the descendants of those interred may open the demolishers up to liability from other descendants who did not want the space demolished.\textsuperscript{98}

As to the process by which repair or renovation should occur, La. R.S. 8:903 and 8:903.1 are somewhat vague. Both La. R.S. 8:903 and 8:903.1 require actual notice or attempts to notify proper parties of a cemetery’s intent to undertake work on a cemetery space. This notice must be in the form of publication in the local official journal and through the placement of notices on the

\textsuperscript{95} Throughout this article, the terms “descendants,” “owners,” and “successors or heirs” all refer to the same people: those with a legally-recognized ownership interest in a cemetery space. For the purposes of this article the term “ownership interest” refers only to the actual right of interment in a cemetery space. This “ownership interest” has been recognized by the Louisiana courts as something less than a fee ownership, but more than a right of use. See Humphreys v. Bennett Oil Corp., 197 So. 222, 228 (La. 1940) (“while plaintiffs do not own, in a strict legal sense, an interest in the cemetery, they do have a ‘species of interest or form of title’ therein.”).

\textsuperscript{96} This reality is supported by the Louisiana jurisprudence, which does appear to recognize that descendants retain rights to control the fate of their ancestors’ burial spaces. See, Leleux v. Viator, 55 So.2d 662, 666 (La.App. 1 Cir. 1951). This reality exists in contrast to the jurisprudential rule that, generally, descendants do not have control over the actual remains of their ancestors. See, Travelers Ins. Co. v. Welch, 82 F.2d 799, 801 (C.A. 5 1936) (this opinion stands in seeming contrast to the holding in Humphreys, supra, n.95 at 228, which states that there is some property interest of descendants in the remains of their ancestors. However, it is apparent that this property interest relates to the ability of descendants to recover for damages when the graves of their ancestors have been disturbed and nothing more.).

\textsuperscript{97} See e.g., Jan Arrigo & Laura A. McElroy, CEMETERIES OF NEW ORLEANS: A JOURNEY THROUGH THE CITIES OF THE DEAD, 12 (Voyageur Books 2005) (noting that, historically, as the remains of family members decayed and new space was needed for interments, the remains would be gathered and placed in a vault below the family tomb, thus leading to substantial numbers of individuals being interred in the same space (and presumably exponentially more descendants of these numerous individuals)).

\textsuperscript{98} The jurisprudence is replete with examples of disagreements among descendants as to the disposition of remains and cemetery spaces. See generally, Byrd v. Byrd, 488 So.2d 1134 (La.App. Cir. 2 1986); In the Matter of Dufour, 622 So.2d 1181 (La.App. 5 Cir. 1993); Spiess v. Greenwood Development Co., Inc., 542 So.2d 810 (La.App. 3 Cir. 1989) Thus, this cautionary note is not without support.
cemetery spaces slated for repair or renovation. Additionally, written notice of the intent to repair or renovate is required to be sent to the record owner via certified or registered mail. After such notice is mailed, the record owners have one year or less to make the necessary repairs. Following the one year period, should no objection be received from the record owner, then, and only then, can the cemetery “proceed with the repairs or renovations.” Cemetery authorities must make diligent efforts to accomplish the notice requirements set forth in the law before undertaking any repairs or renovations to derelict cemetery spaces. Additionally, if at any point during the repairs or renovations, the human remains within need to be moved, the next of kin must, once again, be notified. If the next of kin, after a diligent effort, cannot be reached, the remains may only be moved by an order of a court in the jurisdiction in which the cemetery is located.

The provisions of La. R.S. 8:903 provide for reimbursement to the cemetery authority that spends money on the repair or renovation of a cemetery space when the descendants cannot be located. However, the law has nothing to say about a gained ownership interest in the cemetery space by a cemetery that pays for repairs. Thus, it is probable that cemeteries that fund repairs or renovations of derelict cemetery spaces do so at their own expense.

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100 Id.
101 La. R.S. 8:903(A) (for general cemetery spaces); La. R.S. 8:903.1(A)(2) (for wall vaults the delay period is only six months).
102 La. R.S. 8:903(A).
103 For the purposes of moving human remains, the proper “next of kin” to be contacted is laid out in La. R.S. 8:659. This is a particularly important step, as the Louisiana courts have recognized “a ‘quasi-property’ right of survivors in the remains of their deceased relatives.” Arnaud v. Odom, 870 F.2d 304, 308 (C.A. 5 1989).
104 La. R.S. 8:659.
105 La. R.S. 8:659(B).
106 It is important to note that the term “ownership” as it relates to grave spaces does not comport with the typical definition of that term. Grave spaces are owned, in the traditional sense, by the cemetery authority or landowner. What interest those interred therein or their descendants have is more of an inchoate right – a right of interment. They do not, unless provided by contract, hold an ownership interest in their grave spaces. See, Hugh Y. Bernard, THE LAW OF DEATH AND DISPOSAL OF THE DEAD, 70 (Oceana Publications, Inc. 1966).
Should such cemeteries want to gain an ownership interest in those spaces, there are different rules for private, for-profit versus municipal, religious, and nonprofit cemeteries. Although the law is silent on the rules applicable to private, for-profit cemeteries, they seem to be excluded from the shorter delays provided in La. R.S. 8:903(C). There is a need for legislative clarity in this regard. In the absence of that, it appears, sadly, that private, for-profit cemeteries can act with impunity when dealing with abandoned grave spaces.

As to municipal, religious, and nonprofit cemeteries, once repairs have been done, should the owners or their successors or heirs remain unlocated, after diligent efforts, for a period of three years following the repairs, the cemetery authority may obtain ownership of that space.\textsuperscript{107} Additionally, the resale of such spaces is also subject to the procedures outlined in La. R.S. 8:308. As noted above, “diligent efforts” likely include, but are not limited to, following the advertising procedures noted in La. R.S. 8:308, La. R.S. 8:903, and La. R.S. 8:903.1 and notices near the spaces sought to be repaired or their ownership reclaimed, as well as at cemetery entrances.

Another issue that arises in light of the foregoing discussion is the question of what happens if a family does come forward once notice is given of the intent to repair under La. R.S. 8:903, but refuses to pay for the repairs? Such a scenario is not contemplated in the law. In such a situation, the cemetery may likely proceed with the repairs if they are not objected to by the family,\textsuperscript{108} but it would have to do so at its own expense. There is also no language in the law regarding whether a cemetery authority may repossess a space if the family fails to pay for the

\textsuperscript{107} La. R.S. 8:903(C).
\textsuperscript{108} La. R.S. 8:903(A) states that “[u]pon failing to receive any objections, after due notice has been given, the cemetery authority may proceed with the repairs or renovations with impunity.” Clearly, this gives a cemetery contemplating repairs the authority to proceed with those renovations in the absence of an objection, but it does not burden family with the costs of such work should they not want to undertake it.
reparis upon actual notice being achieved within the three year period\textsuperscript{109} following the repairs. Apparently because families may not be able to afford the repairs that a cemetery believes are warranted and because of the sentimental attachment to cemetery spaces by descendants, the law does not contemplate a repossession simply because a family may be too poor to pay for maintenance. That said, should a family want to use the cemetery space after the repairs have been made at the expense of the cemetery, La. R.S. 8:903 permits cemetery authorities to condition the use on payment of the costs of the repairs.

The rules related to vaults\textsuperscript{110} and wall vaults\textsuperscript{111} under La. R.S. 8:903.1 differ somewhat from those for other cemetery spaces under La. R.S. 8:903. There is no explanation for this difference, but it is probable that the difference is due to the communal nature of vaults and wall vaults – these spaces are generally part of a larger structure at a cemetery, whose deterioration in one space could affect the spaces of others. With respect to these spaces, the law provides cemeteries with the right to immediately undertake repairs or renovations for which the cemetery has no evidence of ownership.\textsuperscript{112} Once the repairs have been completed, the cemetery must place notice in the local official journal requesting people with evidence of ownership to come forward within sixty days to prove such ownership.\textsuperscript{113} Following the lapse of the sixty-day period, the cemetery authority may reclaim ownership of these spaces and may resell them subject to the procedural requirements of La. R.S. 8:903.1. This statute also provides, in La. R.S.

\begin{footnotes}
\item[109] Which would actually be ten or twenty-five years (depending on the parish population) for private, for-profit cemeteries. La. R.S. 8:308.
\item[110] “Vault” is defined in La. R.S. 8:1(19) as, “a space in a mausoleum of sufficient size, used or intended to be used, to entomb human remains.”
\item[111] “Wall vault” is not statutorily defined in Louisiana.
\item[112] It is important to note that such unilateral repair activity is only permitted for vaults or wall vaults that are more than fifty years old or vaults or wall vaults that are in cemeteries that are more than one hundred years old. No such authority exists in the law for spaces younger than those noted in La. R.S. 8:903.1 and it is probable that unilateral repairs in those instances are not permissible. A likely exception to this restriction is a situation in which repairs must be undertaken to protect the public’s safety and health.
\item[113] La. R.S. 8:903(A)(1).
\end{footnotes}
8:903.1(A)(3), that, should the cemetery records indicate ownership of a vault or wall vault in need of repair, notice must be sent to the owners and published in the parish’s official journal giving the owners six months to come forward to prove ownership before the cemetery reclaims the ownership of the space. Like La. R.S. 8:903, La. R.S. 8:903.1(A)(4) similarly requires posting notices in conspicuous places within the cemetery itself.

Unlike the requirement of La. R.S. 8:903, La. R.S. 8:903.1 does not require notification of the next of kin prior to moving remains for the planned repairs. Remains can be temporarily moved for the purpose of effectuating repairs to a vault or wall vault.\textsuperscript{114} Another difference between La. R.S. 8:903 and La. R.S. 8:903.1 is that if an owner comes forward within the prescribed notice period before a reclamation of ownership, the cemetery authority can require a payment of that person’s pro rata share of the repair costs. Should they refuse to pay these costs, ownership reverts to the cemetery authority.\textsuperscript{115} None of the provisions of La. R.S. 8:903.1 are applicable to those cemetery spaces placed in perpetual care.\textsuperscript{116}

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

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

\textsuperscript{114} La. R.S. 8:903.1(A)(2).
\textsuperscript{115} La. R.S. 8:903.1(A)(1).
\textsuperscript{116} La. R.S. 8:903.1(B).
Because the terms “repair,” “renovate,” and “maintain” are not defined in Title 8, we must give them their usual, common sense definitions.\textsuperscript{117} The Oxford English Dictionary\textsuperscript{118} provides the following definitions for the word “repair”:

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

To renew, renovate (some thing or part); to restore to a fresh or sound condition by making up in some way for previous loss, waste, decay, or exhaustion.\textsuperscript{119}

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

To renew materially; to repair; to restore by replacing lost or damaged parts; to create anew.\textsuperscript{120}

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

To keep up, preserve, cause to continue in being (a state of things, a condition, an activity, etc.); to keep vigorous, effective, or unimpaired; to guard from loss or deterioration.\textsuperscript{121}

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

To destroy (a building or other structure) by violent disintegration of its fabric; to pull or throw down, pull to pieces, reduce to ruin.\textsuperscript{122}

\textsuperscript{117} La. C.C. Art. 11.
\textsuperscript{118} The Oxford English Dictionary is used herein because it is well-recognized as the most comprehensive compendium of English language usage, with coverage of all dialects of English, including American English. See generally, Simon Winchester, THE MEANING OF EVERYTHING: THE STORY OF THE OXFORD ENGLISH DICTIONARY (Oxford 2003).
\textsuperscript{120} Id., at 617-618.
\textsuperscript{121} Id., at Vol. IX, p.223.
\textsuperscript{122} Id., at Vol. IV, p.444.
The definition of demolish clearly indicates that the actions contemplated by that word are destructive in nature and not preservative. Thus, though the use of terms such as repair, renovate, and maintain, cemetery authorities may require the removal and replacement of certain components of a cemetery space to ensure its continued existence. These terms, however, which connote preservation, do not incorporate the term demolition and the law does not contemplate the demolition of cemetery spaces in order to achieve the goal of cemetery beautification. Unfortunately, however, the law of Louisiana also does not mandate that the repairs, renovations, and maintenance be done in a historically accurate manner. This unfortunate oversight may lead to and in some cases has clearly led to renovations that are aesthetically pleasing but historically inaccurate.\textsuperscript{123} In such cases, information regarding past cultures and lifeways is lost. There is a relatively easy way to fix this oversight: require renovations to be done according to oversight by historic preservationists. This possibility is explored in a later section.

3. Unmarked Burials Act

As noted above, the LCB is charged with the duty to “enforce and administer the provisions of”\textsuperscript{124} Title 8 and it is empowered to create rules and regulations to effectuate that enforcement and administration.\textsuperscript{125} Although the LCB’s authority to enforce the law of Title 8 is clear and unambiguous, the Legislature has provided a series of cemeteries that are exempted from some of the LCB’s regulatory requirements. These exempted cemeteries are:

\textsuperscript{123} See, Thom, supra, n. 92. See also, Jason Evangelista, LIVING WITH THE DEAD: REDESIGN OF THE HIGHLAND CEMETERY (LSU School of Landscape Architecture 2001) (proposing substantial changes to a historic cemetery to make it more aesthetically pleasing, but with little or no consideration for its historic integrity.

\textsuperscript{124} La. R.S. 8:66. This enforcement and administration authority is only limited by Chapter 10-A of Title 8, which is known as the Louisiana Unmarked Human Burial Sites Preservation Act (“the Unmarked Burials Act”), found at La. R.S. 8:671, et seq. The provisions of this Chapter are enforced (now) by the Louisiana Division of Archaeology and the Louisiana Attorney General.

\textsuperscript{125} La. R.S. 8:67. It is also important to note that the enforcement authority of the LCB extends to typical administrative enforcement. Beyond that authority, the Louisiana Attorney General is empowered to assist the LCB in the enforcement of Title 8.
Thus, as long as the above-enumerated cemeteries are not selling cemetery spaces or interment rights at a rate in excess of three hundred dollars, those cemeteries are exempt from the regulatory requirements of Title 8 for obtaining a certificate of authority from the LCB. However, this does not exempt these cemeteries from the duty to comply with the general provisions of Title 8, nor does it limit the LCB’s authority to enforce these provisions against such cemeteries. In addition, the LCB has, for some time, made a practice of keeping a register of as many of these exempt cemeteries as possible in the interest of maintaining contact information and monitoring their compliance with the three hundred dollar threshold. Such record keeping is a prudent practice and is in keeping with the LCB’s charge to enforce and administer Title 8.

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126 “‘Family burial ground’ means a cemetery in which no lots are sold to the public and in which interments are restricted to a group of persons related to each other by blood or marriage.” La. R.S. 8:1(22).
127 “‘Fraternal cemetery’ means a cemetery owned, operated, controlled or managed by any fraternal organization or auxiliary organization thereof, in which the sale of lots, graves, crypts, vaults or niches is restricted principally to its members.” La. R.S. 8:1(23).
128 “‘Municipal cemetery’ means a cemetery owned, operated, controlled or managed by a municipality or other political subdivision of the state, or instrumentality thereof authorized by law to own, operate or manage a cemetery.” La. R.S. 8:1(31).
129 “‘Community cemetery’ means a cemetery owned, operated, controlled or managed by any association or organization, in which the sale of lots, graves, crypts, vaults, or niches is restricted principally to individuals within a community.” La. R.S. 8:1(14).
130 “State cemetery” is not defined in Title 8, but the plain language of that term suggests that it refers to cemeteries owned and operated by the State of Louisiana.
131 “Federal cemetery” is not defined in Title 8, but the plain language of that term suggests that it refers to cemeteries owned and operated by the United States government.
132 “Religious cemetery’ means a cemetery that is owned, operated, controlled or managed by a recognized church, religious society, association or denomination, or by a cemetery authority or a corporation administering or through which is administered the temporalities of any recognized church, religious society, association or denomination. La. R.S. 8:1(37).
133 La. R.S. 8:78 (emphasis and footnotes added). It is important to note that these exemptions are extremely limited in scope. They only exempt such cemeteries from the necessity to obtain and maintain a certificate of authority from the LCB. They do not exempt such cemeteries from compliance with the remainder of Title 8.
134 E-mail between Ryan M. Seidemann, Assistant Attorney General and Lucy L. McCann, Director, LCB (2/9/09).
As has been noted, it is these exempted cemeteries that are most often the ones in which problems arise related to threats to their historic integrity and the sanctity of the burials therein both through well-intentioned, but inappropriately executed, preservation and conservation efforts and through development activities.\(^{135}\) However, the limits of the LCB’s regulatory jurisdiction extends to enforcing the provisions of Title 8 as to the operating cemeteries in Louisiana. This jurisdiction covers the restrictions against demolition of cemetery spaces within operating cemeteries.\(^{136}\)

What then, if any, is the regulatory authority applicable to the exempt cemeteries and abandoned cemeteries? One way of looking at how Louisiana law applies protection to exempt and abandoned cemeteries is by strictly contrasting the literal definitions of “marked” and “unmarked” burials. Unmarked burials are clearly covered under the Unmarked Burials Act.\(^{137}\) However, there is no definition for the term “marked” in the law. Indeed, even the term “unmarked” is subject to interpretation.

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

Under what we believe is an incorrect interpretation of the intent of the law of cemeteries in Louisiana, the statutes would divide the coverage of the law between the defined “unmarked” graves and the undefined “marked” graves. Under this scenario, the Unmarked Burials Act would not apply to “marked” cemeteries. Many of these cemeteries will be classified as exempt

\(^{135}\) See, Witwer, supra, n.12.
\(^{137}\) La. R.S. 8:671, et seq.
under Title 8. Those entities must comply with La. R.S. 8:308, La. R.S. 8:903 and 8:903.1, regardless of their exempt status. The LCB, being charged with the enforcement of Title 8 generally, can advise exempt, operating cemeteries and can request the assistance of the Attorney General\textsuperscript{138} for the enforcement of these provisions that limit reconstruction and repair of cemetery spaces and restrict their destruction in all active cemeteries in Louisiana.\textsuperscript{139} 

Under this scenario, there appears to be no legal protection for burials with traditional markers that do not fall under the “exempt” classification. In other words, arguably, abandoned cemeteries that have “marked” graves could be plowed under with relative impunity (subject to the desecration restrictions of Title 14) if they do not classify as “exempt” or “nonexempt” cemeteries under Title 8. We believe that such an interpretation of the law is based upon arbitrary principles and would lead to absurd consequences in contravention of La. C.C. Art. 9. As the Legislature cannot be presumed to act in such an absurd manner as to leave such a gap in the law,\textsuperscript{140} we believe that the proper way to look at the legal protections for such cemeteries is through a careful, but thorough interpretation of the Unmarked Burials Act.

Abandoned cemeteries that are otherwise exempt from the purview of Title 8 are not covered by the regulatory authority of the LCB, but are rather under the authority of the Louisiana Division of Archaeology (“the Division”) by virtue of the Chapter 10A of Title 8. As created by Act 704 of 1991, the Louisiana Unmarked Human Burial Sites Preservation Act\textsuperscript{141} (“the Unmarked Burials Act”) was placed under the enforcement authority of the Louisiana Unmarked Burial Sites Board.\textsuperscript{142} However, by Act 791 of 2006, the Louisiana Legislature

\begin{footnotes}
\item[138] The Attorney General’s role in these matters arises by virtue of his being the statutory attorney for the LCB as well as his position as the chief legal officer for the State. La. R.S. 8:69; La. Const. Art. IV, Sec. 8.
\item[139] La. R.S. 8:66.
\item[140] Johnston v. Morehouse Parish Police Jury, 424 So.2d 1053, 1056 (La.App. 2 Cir.,1982) (“As a general rule, the legislature does not enact vain and useless legislation.”).
\item[141] The Unmarked Burials Act is codified at La. R.S. 8:671-681.
\item[142] La. R.S. 8:675.
\end{footnotes}
abolished this Board and rolled its duties into the Louisiana Department of Culture, Recreation, and Tourism, with the Board’s permitting duties now resting as a responsibility of the Louisiana Division of Archaeology and the State Archaeologist.

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

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

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

Second, the definition in La. R.S. 8:673(5) also clearly exempts cemeteries classified as those that are a “recognized and maintained municipal, fraternal, religious, or family cemetery”. There is no definition in Title 8 for either the words “recognized” or “maintained”. However, within the broader context of Title 8, it is apparent that the “recognition” refers to the presence of a cemetery on the LCB’s register of those cemeteries that are operating, but do not meet the three hundred dollar threshold for license requirements. It is also important to note

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143 This reorganization is now codified at La. R.S. 36:209(H)(3).
144 The Division of Archaeology, established in La. R.S. 41:1601, et seq., is under the authority of the Department of Culture, Recreation, and Tourism. La. R.S. 36:209(E).
145 La. R.S. 8:673(5).
146 Id.
147 Another source for the “recognition” requirement may be the Louisiana Historic Cemetery Register. See, Act 600 of the 2008 Louisiana Regular Legislative Session, codified at La. R.S. 25:914 (enacting the Louisiana Historic Cemetery Register).
that the two important words in this phrase of La. R.S. 8:673(5) are disjunctive. Thus, the simple fact that a cemetery is registered with the LCB does not exempt that cemetery from coverage by the Unmarked Burials Act. Only cemeteries that do not hold a current LCB certificate of authority, but that are recognized by the LCB, and are maintained can claim an exemption from the Unmarked Burials Act.

As with the term “recognition”, there is no definition of the term “maintained” in Title 8. Following the requirement of La. C.C. Art. 11, which states that “[t]he words of a law must be given their generally prevailing meaning”, a dictionary definition of the term, “maintain” must be employed to divine the Legislature’s intended application of the Unmarked Burials Act. The Concise Oxford English Dictionary defines “maintain” as to “keep (a building, machine, etc.) in good condition by checking or repairing it regularly.”148 Thus, an unmaintained cemetery would be the equivalent of what would colloquially be referred to as an abandoned cemetery.149

From the previous analysis, the question arises: does the term “unmarked” in the Unmarked Burials Act refer to an actual burial that does not have a grave marker or does it refer generally to the traditional nature of how the cemetery is “marked” (i.e., enclosed by a fence, etc.)? In other words, does the Division’s regulatory authority only cover graves without markers, but not graves with markers or does it cover a broader range of abandoned cemeteries?

148 Catherine Soanes & Angus Stevenson, CONCISE OXFORD ENGLISH DICTIONARY, 860 (Oxford 2006).
149 This is consistent with the definition of the term “abandon”, which is to “give up (an action or practice) completely.” Id. at 2. A cemetery in which the caretakers have given up on keeping it in good condition would be an abandoned cemetery. This consistency is supported by the use of the term “abandoned cemetery” in Title 8. Although Title 8 does not contain a definition for “abandoned cemetery”, the term’s use in La. R.S. 8:112, La. R.S. 8:308, and La. R.S. 8:903 are consistent with the use of the term herein. Indeed, the Louisiana Supreme Court has articulated one query into the question of abandonment thus:

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

A close examination of the Unmarked Burials Act suggests that the Division’s authority extends to the latter. This conclusion is supported by two things: the environment within which the Unmarked Burials Act was created in the early 1990s and the stated legislative intent of the Act.

The Unmarked Burials Act was enacted in the wake of the enactment by Congress of the NAGPRA\textsuperscript{150} in 1990. As was noted above, this piece of legislation set 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 \textit{in situ} remains.\textsuperscript{151} NAGPRA’s legislative history makes abundantly evident the reality that Congress enacted this law because of its desire to make reparations for the wrongs committed against Native Americans since A.D. 1492.\textsuperscript{152} In recognition of the somewhat narrow scope of NAGPRA\textsuperscript{153} many states set out to fill in the gaps left by Congress in the years after 1990.\textsuperscript{154} Louisiana’s enactment of the Unmarked Burials Act in 1991 was part of this state-level movement nationwide. Because many of the states, Louisiana included, enacted burial protection laws that were much more comprehensive and preservation-oriented than is NAGPRA, these laws should likely be broadly construed when considering which burials are covered.

\textsuperscript{150}25 U.S.C. 3001, \textit{et seq.}
\textsuperscript{152}As noted in S. Rep. No. 100-601 (Oct. 21, 1988) at 2:
\begin{quote}
It is the view of this Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion.
\end{quote}
\textsuperscript{153}It only applies to Native American remains and graves and it only applies on federal or tribal land or when federal funds are involved in a project. \textit{See}, Ryan M. Seidemann, \textit{Time for a Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act}. 106 \textit{W.Va. L. Rev.} 149 (2003).
The stated legislative purpose in La. R.S. 8:672 clearly makes this Act one of broad application. That purpose states:

The legislature finds that existing state laws do not provide for the adequate protection of unmarked burial sites and of human skeletal remains and burial artifacts in such sites. As a result, there is a real and growing threat to the safety and sanctity of unmarked burial sites, both from economic development of the land and from persons engaged for personal or financial gain in the mining of prehistoric and historic Indian, pioneer, and Civil War and other soldiers' burial sites. Therefore, there is an immediate need for legislation to protect the burial sites of these earlier residents of Louisiana from desecration and to enable the proper archaeological investigation and study when disturbance of a burial site is necessary or desirable. The legislature intends that this Chapter shall assure that all human burial sites shall be accorded equal treatment, protection, and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations.155

This legislative purpose is informative in that it recognizes the significant threats to cemeteries and it extends its coverage equally, regardless of the ethnic or cultural affiliation of the burials and regardless of the age of the burials. Equally important is the fact that the Legislature distinguished three classes of things in need of protection: human remains, burial artifacts, and burial sites.156 From the recognition that burial sites are in need of protection, the purpose of the Unmarked Burials Act appears to provide the Division with the authority to permit activities occurring within any cemetery in Louisiana that meets the following classifications:

1) It is not a cemetery with a valid certificate of authority from the LCB;
2) It is not a cemetery registered with the LCB; and
3) It is not a maintained cemetery.

Thus, it is clear that the Division’s authority to regulate activities in abandoned cemeteries under the Unmarked Burials Act is broad and does not rest on whether the actual

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155 La. R.S. 8:672.
156 Id.
grave in question is associated with an actual marker. Further, the LCB has no regulatory jurisdiction over cemeteries that fall within the coverage of the Unmarked Burials Act.

This interpretation of the Unmarked Burials Act’s coverage is consistent with the realities of many isolated and abandoned cemeteries. In the case of abandoned and isolated cemeteries, it is highly unlikely that the graves with markers are the only graves on site. This is a common problem as many markers were historically made of perishable materials that may have succumbed to the ravages of time. Additionally, even stone or cement markers, if not properly set, may have sunken into the ground and are no longer visible. Thus, there would be an absolute requirement to follow the Unmarked Burials Act procedures with respect to the unmarked graves. It is doubtful that the Legislature intended for two separate sets of law to apply to the same piece of property. Accordingly, it is more likely that the Unmarked Burials Act was intended to be applied as supplemental protection to the marked and unmarked graves in isolated and abandoned cemeteries.

Because the Division is vested with the authority to regulate any activities in abandoned cemeteries, it seems unlikely that the Legislature intended that the requirements to seek familial

157 See e.g., the description of such problems in the cemetery in Thomas v. Mobley, supra, n. 33. In addition to problems of deteriorated and sunken grave markers, especially in the American South, Jeane notes that, historically, “gravestones were not especially common.” Gregory Jeane, Rural Southern Graveyards: Sacred Artifacts in the Upland South Folk Cemetery, in David Watters (ed.), MARKERS IV, 55, 57 (1987).
158 See e.g., Bryan S. Haley, GEOPHYSICAL SURVEY OF HIGHLAND CEMETERY, BATON ROUGE, LOUISIANA (Center for Archaeological Research, Univ. of Mississippi 2003) (documenting numerous unmarked graves in a historic cemetery). Indeed, Kehoe-Forutan, et al. have documented a historic cemetery in Pennsylvania for which there are currently 266 visible markers, but for which estimates of actual space available for burials range as high as 1080. A ground penetrating radar confirmed that there were enough unmarked burials that the 1080 burial capacity cemetery was full and should not be reopened for new burials. Sandra J. Kehoe-Forutan, Bruce A. Campbell, and Michael K. Shepard, Penetrating the Mystery Beneath Millville Friends Meeting Cemetery, 28 AGS QUART. 11 (2004). See also, Shannon Seckinger, Picking Up the Pieces: The Osborn Family Cemetery, Brielle, NJ, AM. CEM. 22 (Apr. 2006) (a discussion of similar ground penetrating radar results); Garry O’Hara, The Case of the Buried Tombstones: A Story of Gravestone Recovery and Restoration in Colorado, 32 AGS QUART. 7 (2008); Anon., Human Skulls, Coffins Found at Apartment Contruction Site, AM. CEM. 4 (Jun. 2009) (a brief mention of cemetery disturbance at a construction site in Miami because there was no surface evidence of the cemetery’s existence).
159 Johnston v. Morehouse Parish Police Jury, 424 So.2d 1053, 1056 (La.App. 2 Cir. 1982) (“As a general rule, the legislature does not enact vain and useless legislation.”).
or judicial approval for disinterment under La. R.S. 8:659 to apply to abandoned cemeteries. These requirements are embodied in the Division’s charges under the Unmarked Burials Act, to wit:

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

* * *

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

* * *

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

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

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

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.

Basically, what La. R.S. 8:304(A) means is that, once a piece of property is used as a cemetery, the property becomes dedicated to that purpose. Thus, a cemetery does not depend on any

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160 La. R.S. 8:676.
161 See, Louisiana Cablevision v. Louisiana Public Service Commission, 493 So.2d 555, 558 (La. 1986), in which the Louisiana Supreme Court recognized, in dicta, the time- and resource-wasting nature of applying duplicative laws.
162 La. R.S. 8:304(A).
163 See generally, Locke v. Lester, 78 So.2d 14 (La.App. 2 Cir. 1955); Humphreys, supra, n.95; see also, Thomas v. Mobley, supra, n. 33, at 478. It is important to note that the dedication of property as a cemetery need not be a formal or recorded dedication. Humphreys, supra, n. 95, at 225. Indeed, the mere use of a piece of property as a burial place is enough to effectuate the dedication. Id. Although the Humphreys court (at 227) seems to suggest that an abandonment of the cemetery may also effectuate a removal of the dedication, such is not the case. The
specialized markings or border, nor is there any need for a recordation of the cemetery to be effectuated in the public records. The mere removal of obvious graves from that property does not accomplish a removal of the dedication. Part of the reason that a dedication is not removed by the removal of obvious graves is the reality that, although obvious graves may be removed, other remains may continue to be interred at a site, thus necessitating continued protection. The other component to this requirement is legal: La. R.S. 8:306 – the provision of the law that provides for the removal of the dedication – requires that all remains be removed from the area that is to be undedicated.

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

When considering the Unmarked Burials Act, it is prudent to consider the interplay of the LCB’s regulatory authority under Title 8 and the Division’s regulatory authority for potential conflicts. As is noted above, the LCB has no regulatory authority over cemeteries considered to

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164 Humphreys supposition is based, as is the one in Thomas (at 478), on the premise that if a cemetery is abandoned-in-fact and the descendants have died off or moved away, that the cemetery “may lose [its] sacred and protected character”. Thomas, supra, n. 33, at 478. However, this supposition stands in stark contrast to the more recent action of the Louisiana Legislature and the U.S. Congress, both of which have affirmed the perpetual sacred and protected nature of cemeteries with the Unmarked Burials Act and NAGPRA, respectively. Thus, this supposition is, at the least, outmoded, and at most, legislatively overruled.

165 See generally, Humphreys, supra, n.95; see also, Thomas, supra, n.33.

166 It is also important to note that Louisiana courts have held that the dedication of property as a cemetery is not subject to prescription. Lester v. Locke, supra, n.163, at 16.

167 See e.g., Haley, supra, n.158. See also, Jeane, supra, n.157.

168 See also, La. R.S. 8:316 for the procedure to be followed for disturbing cemeteries for non-cemetery purposes (a limited list) both when a cemetery authority exists and when one does not.
be abandoned and with the coverage of the Unmarked Burials Act. That said, LCB-regulated cemeteries must comply with some historic preservation requirements when undertaking certain activities. Thus, for those cemeteries that hold current certificates of authority from the LCB or those that meet the requirements of La. R.S. 8:673(5) (i.e., cemeteries that do not fall under the coverage of the Unmarked Burials Act), compliance with La. R.S. 8:308, 8:903, and 8:903.1 is mandatory. All other cemeteries are subject to the regulatory and permitting authority of the Division under the Unmarked Burials Act. Accordingly, there does not appear to be any overlapping authority between the LCB and the Division.

4. Protection of Cemeteries on State Land

If the land containing a burial, marked or unmarked, is categorized as State property then the burial falls under the authority of the Louisiana State Land Office (“SLO”). The SLO is “responsible for identifying, managing, and regulating state public lands and waterbottoms.” Some of the authority of the SLO is deferred to the Department of Culture, Recreation, and Tourism (“CRT”), which in turn serves to administer and protect historic or prehistoric resources, including cemeteries, on State owned property.

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

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168 La. R.S. 8:308; 8:903; 8:903.1.
169 This is simply a recognition of the reality that the SLO functions as the manager of lands owned by the State, thus meaning that it has some management authority over such burials.
172 La. R.S. 41:1603.
located on or in the lands of the State of Louisiana.\(^{173}\) The Division also serves as an advisory source for all State agencies to evaluate the impact of their projects on these sites.\(^{174}\) According to Title 41, it is illegal for any person, agency, or political subdivision to excavate or alter in any way, State lands without first obtaining a permit or contract from the Division.\(^{175}\)

5. **The Protection of Cemeteries on Private Lands**

One division of CRT that regulates the protection and management of significant historic sites, is the Division of Historic Preservation (“DHP”).\(^{176}\) One function of the DHP is to administer the State’s responsibilities with respect to the National Register of Historic Places (“National Register”), which was established by Congress in 1966 as part of the NHPA.\(^{177}\) The DHP is responsible for nominating buildings, sites, districts, and other potentially significant properties to the National Register.\(^{178}\) The DHP can grant tax incentives to Louisiana citizens with property on the list that continue to restore and preserve the site, sometimes with up to a 25% tax credit.\(^{179}\) As has been noted in other studies, tax incentives may represent significant reasons for the preservation of private property.\(^{180}\)

Cemeteries on private land receive the least protection. Such cemeteries are left to the regulation of the LCB and the Division in only a limited capacity. With regard to cemeteries on private lands that are classified as unmarked, the Division has regulatory authority by virtue of

\[^{173}\text{La. R.S. 41:1604.}\]
\[^{174}\text{Id.}\]
\[^{175}\text{La. R.S. 41:1605.}\]
\[^{176}\text{La. R.S. 25:911, et seq.}\]
\[^{177}\text{La. R.S. 25:912.}\]
\[^{178}\text{La. R.S. 25:912(1).}\]
\[^{179}\text{La. R.S. 25:912 (these tax incentive programs can be found at 26 U.S.C 47 and La. R.S. 47:4311, et seq.).}\]
\[^{180}\text{See e.g., Ryan M. Seidemann and Catherine D. Susman, Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives, 17 J. ENVTL. L. & LITIG. 441 (2002).}\]
the Unmarked Burials Act. Other cemeteries either fall under the LCB’s regulatory authority or the provisions of La. R.S. 8:308, 8:903, or 8:903.1.

6. Criminal Sanctions as Protections for Cemeteries

In addition to the protections for cemeteries present in Titles 8 and 41, Title 14, the Criminal Code, makes desecration of graves a crime in Louisiana. The crime of grave desecration, a misdemeanor, bars the disturbance of or displacement of both human remains and grave markers/grave goods. Although it is doubtful that this law was enacted to promote historic preservation, it at least has the side effect of preventing outright cemetery destruction in Louisiana. Nothing in this law restricts non-historically accurate work being done in cemeteries, but it does provide for criminal sanctions against those who would, with wanton disregard, plow through cemeteries for construction or looting purposes. It is important to note that La. R.S. 14:101 does not restrict lawful disinterment. Thus, it appears that, as long as the Title 8 procedures outlined above for moving remains or reclaiming a grave space are followed, La. R.S. 14:101 is inapplicable to disinterment and alterations within cemeteries.

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181 La. R.S. 41:1604.
183 The Louisiana courts have held that temporary movements of markers for cemetery maintenance does not represent desecration. See generally, Thomas, supra, n.33.
184 Although there are no reported cases directly on the application of La. R.S. 14:101, this concept is supported by the reverence granted to burials in Travelers Ins. Co. v. Welsh, 82 F.2d 799 (C.A. 5 1936). The nature of this law as being directed at preventing criminal activity is highlighted by the following quote on the predecessor to La. R.S. 14:101:

It is aimed exclusively at the misdeeds of vandals and ghouls and cannot, even by straining its language, be made to cover the acts of persons proceeding within their legal and contract rights. Reichelt v. St. Vincent’s DePaul Cemetery Ass’n, 10 Orleans App. 100, *3 (La.App. Orleans 1913).

185 Id.
186 Bunol v. Bunol, 127 So. 70 (La. 1930); see also, Thomas v. Mobley, supra, n. 33 (limiting such disinterments to criminal inquiries and public protection purposes); see also, Choppin v. Labranche, 20 So. 681, 682 (La. 1896) (noting that disturbance of the dead should only occur for “lawful necessary purposes”); see also, T. Scott Gilligan and Thomas F.H. Stueve, MORTUARY LAW (9th ed), 49-53 (2005) (commenting that, generally, disinterment is disfavored).
7. Access rights for conservation purposes

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

The Louisiana jurisprudence clearly permits access to isolated cemeteries. In the case of In re St. James Methodist Church of Hahnville, the Louisiana Fifth Circuit observed that,

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

Although access to isolated cemeteries is provided for by the Louisiana jurisprudence, it is also likely that the right of passage would, by analogy, be subject to the typical restrictions that

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187 Mitford, supra, n.6, at 97-98; see also, Jeane, supra, n.157.
188 Bernard, supra, n.106 at 70-71.
189 For the purposes of this article, the term “isolated cemetery” refers to those cemeteries that have become separated from easy access due to property transfers and the like, typically causing them to lie wholly within the property of someone unrelated to the descendants of those interred in the cemetery.
190 95-410 (La.App. 5 Cir. 12/27/95) 666 So.2d 1206 (emphasis added) (citing Vidrine v. Vidrine, 225 So.2d 691, 697-698 (La.App. 3rd Cir.1969)). See also, Roberts v. Stevens, 389 So.2d 782, 785 (La. App. 3 Cir. 1980). The limited scholarly commentary on this subject is also in agreement with the Louisiana jurisprudence. See e.g., Bernard, supra, n.106, at 71 (stating that “the new owner must permit reasonable access to family members wishing to visit the graves.”). See also, Trefry v. Younger, 114 N.E. 1033 (Mass. 1917); Nicholson v. Daffin, 83 S.E. 658, 660 (Ga. 1914).
may be placed on a dominant servitude holder by a servient estate. These limitations may include reasonableness as to the times of day during which access may occur,\textsuperscript{191} making a route available that is not the shortest, but is one that is least disruptive to the current landowner,\textsuperscript{192} and allowing for damages to the current landowner for reckless or injurious acts by the cemetery visitor,\textsuperscript{193} to name a few.\textsuperscript{194}

Although the above analysis demonstrates a sufficient legal basis for the descendants of someone buried in an isolated cemetery to have access across the property of another for the purposes of visiting and maintaining the cemetery, there are also other issues at play here. As has been previously discussed, the importance of the preservation of historic cemeteries is paramount in Louisiana. Thus, the facilitation of access to historic cemeteries,\textsuperscript{195} of which most of the isolated cemeteries will be, is extremely important in the interest of preserving these sacred and historically significant sites.

\textsuperscript{191} La. C.C. Art. 728.
\textsuperscript{192} See e.g., Cash Point Plantation Equestrian Center, Inc. v. Shelton, 40,647 (La.App. 2 Cir. 1/25/06) 920 So.2d 974. See also, Bailey v. McNeely, 2005-629 (La.App. 3 Cir. 12/30/05) 918 So.2d 1124.
\textsuperscript{193} La. C.C. Art. 689. See e.g., Bouser v. Morgan, 520 So.2d 937 (La. App. 3 Cir. 1987).
\textsuperscript{194} Further seeking guidance from analogies to servitudes under the Louisiana Civil Code, then-Judge Tate in the \textit{Vidrine} matter, supra, n.190, stated that while those with an interest in visiting cemeteries such as the ones discussed herein have certain duties to act prudently when they traverse another’s property, the property owner also has some correlative duties to the visitors. In his separate opinion in \textit{Vidrine}, Judge Tate noted that, with respect to the right of access, the property owner “can do nothing tending to diminish its use, or make it more inconvenient.” \textit{Vidrine}, supra, n.190, at 699 (citing, former Civil Code Art. 777; current Civil Code Art. 748). Thus, reasonableness in both the exercise and the provision of the right of access to isolated cemeteries is the underlying policy prompted by the jurisprudence of this State.
\textsuperscript{195} The definition of a “historic cemetery” as used herein comes largely from the definition in Act 600 of the 2008 Regular Session of the Louisiana Legislature, which states that cemeteries eligible for the Louisiana Historic Cemetery Register must meet the following criteria:

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

Act 600, § 1; codified at La. R.S. 25:914(C). This definition of “historic” is consistent with the definition of that term in the National Historic Preservation Act, 16 U.S.C. 470, \textit{et seq.}
8. State Law Shortcomings

a. Laws Permitting Impacts to Cemeteries

Unfortunately, while Title 8 does provide some mechanisms, as noted above, for maintaining cemeteries without destroying them, other provisions of Louisiana law do permit destruction under some circumstances. The most important of these is the law related to expropriation. In most, if not all instances, the expropriation of cemetery property will occur in advance of construction activities.\(^{196}\) The legal issues dealing with cemeteries in Louisiana that may be impacted by construction are fairly complex. The legislation that applies to these matters is spread over several portions of the Revised Statutes and gaining a clear picture of the applicable law is difficult.

i. General Expropriation Law

The general provisions of expropriation law in Louisiana are found at La. R.S. 19:1, \textit{et seq}. Under this law, when a price for purchasing property needed for a public purpose\(^{197}\) cannot be agreed upon by the expropriating authority\(^{198}\) and the owner, certain properties may be expropriated for public purposes, including:

\(^{196}\) Governments and developers should be extremely wary of cemetery relocations. In addition to the reality that disinterments are disfavored under the law, such actions often disturb hornets’ nests of public sentiment that can either bog matters down in the courts for long periods of time or create terrible public relations messes or both. See \textit{e.g.}, Megan Matteucci, \textit{Groups Ask for Jury Probe in Relocation of Graves}, ATLANTA JOURNAL-CONST. (1/7/09); Megan Matteucci, \textit{Families Keep Up Fight Against Moving Graves}, ATLANTA JOURNAL-CONST. (1/9/09); Associated Press, \textit{Texaco Wins Fight for Burial Grounds}, TIMES PICAYUNE C2 (6/9/98); Elizabeth J. Himelfarb, \textit{Cover-Up at City Hall?}, 52 ARCHAEOI. 14 (1999).

\(^{197}\) It is interesting to note that the term “public purpose” for the purposes of expropriation has been the subject of much debate in recent years. Following the United States Supreme Court decision in \textit{Kelo v. City of New London, Conn.}, 545 U.S. 469 (2005), many state legislatures – Louisiana’s among them – quickly moved to enact state-level protections against the taking of private property for private purposes. Louisiana’s version was enacted as Act 851 of the 2006 Regular Session, which amended La. Const Art I, Sec. 4 and Art. VI, Sec. 21. Although most government projects will likely fulfill the classification of a “public purpose” to which \textit{Kelo} and Act 851 of 2005 do not apply, a review of these sources, as well as La. Atty. Gen. Op. No. 07-0147, may be warranted in future cemetery expropriation situations.

\(^{198}\) The term “expropriating authority” generally applies to governmental entities and the private entities with the authority to carry-out the activities listed in La. R.S. 19:2.
1) “the construction of railroads, toll roads, or navigation canals;”

2) “the construction and operation of street railways, urban railways, or inter-urban railways;”

3) “the construction and operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;”

4) constructions for the transportation of natural gas;

5) the erection of telephone or telegraph lines;

6) the erection of electricity lines and the construction of the infrastructure necessary to support such lines;

7) the construction of other pipelines; and

8) various other provided-for activities.

Excepted from this listing of appropriate uses of the power of expropriation is anything that will impact cemetery property. Specifically, La. R.S. 19:3 states that,

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199 La. R.S. 19:2(2).
200 La. R.S. 19:2(3).
201 La. R.S. 19:2(4).
202 La. R.S. 19:2(5). It should also be noted that, although general expropriation rules permit expropriation for the construction of hydrocarbon pipelines, the exploration for and production of minerals is expressly prohibited within the confines of a cemetery in Louisiana. La. R.S. 8:901. One outstanding question is whether it also prohibits seismic activity within such cemeteries. The law clearly prohibits “prospecting” within cemeteries. There is no Louisiana jurisprudence that defines prospecting in terms of conducting seismic surveys. It should be noted that there is no jurisprudence stating that seismic surveys are not “prospecting.” Thus, it has apparently not been an issue before the Louisiana courts. However, several other states’ jurisprudence does include seismic activity within the term “prospecting.” See e.g., Meyer v. Berg, 2007 WL 1430226 (E.D.Wis. 2007); Trutec Oil And Gas, Inc. v. Western Atlas Intern., Inc., 194 S.W.3d 580 (Tex.App. 14 Dist. 2006). Thus, it seems safe to say that the “prospecting” referred to in La. R.S. 8:901 does indeed include seismic operations. Accordingly, under Louisiana law, such activities are likely prohibited in a cemetery. It should be noted, however, that as a policy matter, the Louisiana Cemetery Board has taken the position that directional drilling under cemeteries is permissible and is not a violation of La. R.S. 8:901. Personal communication between Ryan M. Seidemann, AAG, and Lucy L. McCann, Director, Louisiana Cemetery Board, Jan. 23, 2009. It is important to note, however, that for the cemeteries covered by La. R.S. 8:671, et seq., ones over which the LCB has little or no jurisdiction, the same permissibility for directional drilling cannot be said with any certainty. The Louisiana Division of Archaeology, which administers La. R.S. 8:671, et seq, has made no pronouncement indicating whether or not such activities are acceptable.
204 La. R.S. 19:2(7).
205 La. R.S. 19:2(8)-(10).
No graveyard or cemetery shall be expropriated unless the court finds that the route of expropriation cannot be diverted from that proposed by the plaintiff without great public loss or inconvenience.

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

a place used or intended to be used for the interment of the human dead. It includes a burial park, for earth interments; or a mausoleum, for vault or crypt interments; or a columbarium, or scattering garden, for cinerary interments; or a combination of one or more of these.\(^{207}\)

Although it is not specifically defined by Title 8, the above definition of cemetery also likely must encompass the term “graveyard” as it is contemplated by La. R.S. 19:3.\(^{208}\) However, the terms “graveyard or cemetery,” as used in La. R.S. 19:3 also encompasses the term “unmarked burial site,” which is defined by La. R.S. 8:673 as:

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

As for what constitutes a “loss or inconvenience,” there is some jurisprudential guidance in this regard. In *City of New Orleans v. Christ Church Corp.*,\(^{209}\) the Louisiana Supreme Court found that the La. R.S. 19:3 requirement that a “great loss or inconvenience” that must exist before the expropriation of cemetery property has been met when cemetery property “is vitally needed for street purposes”.\(^{210}\) Thus, it is probable that any project for which a reasonable public purpose can be articulated will likely pass the *Christ Church* test and construction through cemetery property will be permitted.

\(^{207}\) La. R.S. 8:1(7).
\(^{208}\) This is consistent with the common usage of the term “graveyard” as defined by the Oxford English Dictionary. That source simply defines the term as “a burial ground.” Oxford English Dictionary, Vol. VI, p. 787 (2d ed. 1989). See also, Bernard, *supra*, n.106, at 69.
\(^{209}\) 81 So.2d 855, 858 (La. 1955).
\(^{210}\) *Id.* This is fairly consistent with the federal Fifth Circuit’s admonition in *Travelers Ins. Co. v. Welch* that human remains should only be disturbed for “necessary or laudable purposes.” 82 F.2d at 801.
ii. Applicable Cemetery-Specific Law

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

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

If cemetery property must be used for a particular project, the property will have to be acquired from its owners. This can be done either through purchase or expropriation. Generally, before anyone can go the route of expropriation, a good faith effort must be made to identify and contact the cemetery authority\(^{211}\) and the owners of interment rights in the cemetery. These requirements are embodied in La. R.S. 8:316. That law provides that:

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

Although La. R.S. 8:316 initially appears to conflict with the law of expropriation, a closer examination shows that it is merely intended to slow the “march of progress.” While La. R.S. 8:316 is intended, as is La. R.S. 19:3, to dissuade the use of cemetery property for other purposes – and indeed, to restrict such other purposes when human remains are still interred on the property – it is not an absolute bar to the reuse of cemetery property.

In the event that there is no cemetery authority managing the property, the next step would be to seek authority from those owning interment rights in the cemetery for permission to

\(^{211}\) The term “cemetery authority” is specifically defined by Title 8 thus: any person, firm, corporation, trustee, partnership, association or municipality owning, operating, controlling or managing a cemetery or holding lands within this state for interment purposes. La. R.S. 8:1(9).
use the property for non-cemetery purposes.\textsuperscript{212} Title 8 does provide for the heritability of such rights, and due diligence may involve making a good faith effort to locate the descendants of those known to be interred in a cemetery.\textsuperscript{213} Failing such identification, because many cemeteries predate the existence of the requirements in Title 8 that govern how cemetery authorities are to function,\textsuperscript{214} in many cases, no written records will exist to evidence such interment rights that may be identifiable from the successions of those who originally owned the rights, aside from tombstone inscriptions. This scenario presents a conundrum that is not contemplated by Title 8. In the absence of both a cemetery authority and identifiable owners of interment rights, the standard procedure for expropriation is probably appropriate when it can be shown that no burials will be disturbed in a planned construction project.\textsuperscript{215}

2. Dedication of Property for Cemetery Use

The “dedication” referred to in La. R.S. 8:316, \textit{supra}, is the dedication of property for cemetery purposes under La. R.S. 8:304. There is no distinction in the law as to whether cemetery property becomes “dedicated” simply by virtue of its use as a cemetery or if something must be filed in the court records to effectuate the dedication. The LCB’s position has consistently been that it is merely the use of property as a cemetery that effectuates the dedication.\textsuperscript{216} Due to the generally inviolate status that cemeteries hold within our culture, the

\begin{flushright}
\textsuperscript{212} This concept is not explicitly stated in the law. However, taking a cue from La. R.S. 8:308, the successors to the deceased clearly have an interest in what occurs in their ancestors’ cemetery and not to consult them or at least make a diligent effort to locate them seems to be an invitation for a \textit{Humphreys}-style lawsuit.
\textsuperscript{213} See, La. R.S. 8:803.
\textsuperscript{214} Most of Title 8 was enacted by the Louisiana Legislature in 1974.
\textsuperscript{215} In the event that unmarked burials will be disturbed, La. R.S. 8:671, \textit{et seq.}, would apply and would control what law to follow.
\textsuperscript{216} This policy position of the LCB is consistent with the Louisiana Supreme Court’s appreciation of the term “dedication” with regard to cemetery property in \textit{Humphreys, et al. v. Bennett Oil Corp. et al.}, 197 So. 222 (La. 1940), commenting that,
\end{flushright}
LCB’s position is likely what was intended by the Legislature with La. R.S. 8:304. Accordingly, even after the owners or cemetery authority has been contacted pursuant to La. R.S. 8:316, and (if necessary) the remains have been removed, the property is still subject to the restrictions embodied in La. R.S. 8:304 until the dedication has been removed pursuant to La. R.S. 8:306-307.

The dedication cannot be removed until all remains have been properly removed from the portion of the cemetery that will be affected by a project.\textsuperscript{217} In addition, only a court can remove the dedication.\textsuperscript{218} Once any remains have been removed from the impacted area, the party seeking to use the cemetery property for non-cemetery uses may apply for a declaratory judgment to the district court for the parish in which the cemetery is located seeking an order that the cemetery dedication should be removed.\textsuperscript{219} In addition, La. R.S. 8:306 requires that notice of such an action be served upon the LCB.

3. **Expropriation of Cemetery Property When Burials Will be Disturbed**

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

\textsuperscript{217} La. R.S. 8:306.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
a. Disturbance of Marked Burials

In situations in which marked burials\footnote{The term “marked burials” as used herein, refers generally to burials in cemeteries that are regulated by the LCB (cf., those under the jurisdiction of the Unmarked Burials Act).} are to be disturbed by a planned project, these burials must be moved prior to any construction activity. Moving human remains from an interment cannot be a unilateral activity. Title 8 provides a specific schedule of individuals who must give permission for the moving of human remains.\footnote{La. R.S. 8:659.} Louisiana Revised Statute 8:659 provides that:

A. The remains of a deceased person may be moved from a cemetery space to another cemetery space in the same cemetery or to another cemetery with the consent of the cemetery authority and the written consent of one of the following, in the order named, unless other directions in writing have been given by the decedent:

(1) The surviving spouse, if no petition for divorce has been filed by either spouse prior to the death of the decedent spouse.

(2) The surviving adult children of the decedent, not including grandchildren or other more remote descendants.

(3) The surviving parents of the decedent.

(4) The surviving adult brothers and sisters of the decedent.

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

Following a good faith effort to locate and obtain permission from the individuals listed in La. R.S. 8:659(A)(1)-(4), a court may be petitioned pursuant to La. R.S. 8:659(B) for the removal of remains. Because most cemeteries that will be impacted by planned construction will likely be historic, the requisite individuals in La. R.S. 8:659(A)(1)-(4) may no longer be living. In addition, there will likely be no cemetery authority associated with such cemeteries. Once those facts have been established, the party wishing to move the remains must follow the
procedure of La. R.S. 8:659(B). Although La. R.S. 8:659 does not contemplate a party other than the cemetery authority seeking such a judgment from a court, it is apparent that this oversight was not intended to stifle future generations from, as a matter of last resort,\footnote{The statement that this should be a matter of last resort is in reference to the requirement of La. R.S. 19:3 that the taking of cemetery property for other purposes under expropriation must be done pursuant to a vital need. An interesting case in the Louisiana First Circuit, however, has recently allowed La. R.S. 8:658 and La. R.S. 8:659 to be used by someone other than a cemetery authority. In \textit{Gilmore v. Whited}, 2008-1808 (La.App. 1 Cir.) 2009 WL 837730, the court allowed an estranged father to use La. R.S. 8:658-659 to support a cause of action to move the remains of his deceased daughter. Although the case is merely an appeal of procedural matters, the court did permit a non-cemetery authority to use those laws and, in addition, found that the 60-day period noted in La. R.S. 8:658 not to be prescriptive in nature (i.e., cases brought under that law need not be brought within 60 days).} using former cemetery property for other purposes. Accordingly, in the absence of the existence of a cemetery authority, the party wishing to move remains pursuant to La. R.S. 8:659(B) may petition a court for such removal.

It is interesting to note that, in one of the few reported cases that deals with the expropriation issues related to cemeteries,\footnote{City of New Orleans v. Christ Church Corp., supra, n.209.} the Louisiana Supreme Court required the appointment of a curator-ad-hoc to represent the interests of the unknown individuals interred in Girod Cemetery in New Orleans during the expropriation process. This appointment was based on former Louisiana Civil Code Article 56, which stated:

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

Following the passage of Act 989 of 1990, this article no longer exists.\footnote{This is probably appropriate, as the law behind this appointment related to absent persons, which the dead are certainly not under the provisions of La. C.C. Arts. 47-53, particularly because La. C.C. Arts. 54-59 deal specifically with the distinction between dead people and absent people.} Accordingly, it is probable that, in cases filed pursuant to La. R.S. 8:659(B), there is no legal necessity for the appointment of a curator to represent the interests of those whose descendants cannot be found or identified following a diligent effort. However, the simple lack of necessity for such an
appointment does not mean that a court could not, of its own motion, appoint such a curator, should it find that the circumstances warrant such an appointment – only that it is no longer required by law. 225

III. The Comprehensive Protection of Cemeteries Under Louisiana Law: A Combined Analysis of Titles 8, 14, and 41

When examining the totality of pronouncements by the Louisiana Legislature as related to cemeteries, it is apparent that the existing protections are fairly comprehensive. In Title 8, substantial restrictions on the alteration of grave spaces in operating cemeteries and even in abandoned cemeteries is present. 226 Title 14 further restricts any intentional or criminally negligent damaging of grave spaces. 227 Title 41 provides that alterations to cemeteries on State property must be vetted through a Division of Archaeology permitting process. 228 In addition, Title 8 mandates that the alteration of any unmarked human burial site must be done pursuant to a Division of Archaeology permit. 229

In addition to these State law protections, federal law that applies in Louisiana also provides some measure of protection for cemeteries. NEPA, the NHPA, and ARPA establish requirements for consideration and permitting of historic and archaeological sites (including cemeteries) on federal land and in project areas where federal funding or federal permitting are

225 This explication is consistent with the change in the law noted in La. C.C. Art. 47, cmt. a. It should be noted, however, that other states have appointed similar curators for “unknown and unrepresented persons who may be interred in” a cemetery. See, Judgment Entry, In Re: The Matter of the Removal of Human Remains from Cemeteries in Kansas City, Platte County, Missouri, Docket No. 07AE-CV00593, Div. I (Cir. Ct. Platte County, Missouri 4/17/08). Accordingly, the concept is not an antiquated notion, it is just no longer mandatory in Louisiana. It may be argued, however, that the LCB serves this function today through the required notice that is to be served on that body. However, because there is no reported case of the LCB ever opposing such activities, this notion is nothing more than speculation.
226 La. R.S. 8:308, 8:903, and 8:903.1.
228 La. R.S. 41:1601, et seq.
229 La. R.S. 8:671, et seq.
involved.\textsuperscript{230} Section 4(f) provides virtually required avoidance of cemeteries during federal highway construction.\textsuperscript{231} Further, NAGPRA provides absolute protection for Native American burial sites found on federal or tribal land.\textsuperscript{232}

Considering the foregoing brief review, where to the holes exist in the existing law that protects historic cemeteries? The combined protections of State and federal law were obviously never intended, with the exception of Title 41, to protect historic resources. In this regard, the Title 8 protections against destruction of grave spaces are aimed at cemetery authorities and not descendants.\textsuperscript{233} Thus, descendants could dismantle historic grave spaces without regard to the preservation of the historic record. In addition, there is no requirement that repair and maintenance by cemetery authorities be done in keeping with historically accurate standards.\textsuperscript{234}

Further, the bulk of the State and federal law, with the exception of the Unmarked Burials Act and NAGPRA, does not apply to cemeteries on private land.\textsuperscript{235} Thus, if repairs or dismantling are done on cemeteries on private property with no requirement for historic documentation, preservation, or mitigation, substantial social and scientific data will be lost and the historic aesthetic of these sites will be compromised.\textsuperscript{236} In addition, if remains are exhumed and reburied with no analysis pursuant to a permit, vast stores or scientific data will be lost.\textsuperscript{237}

\textsuperscript{230} See generally, discussion in Part II(A), supra.
\textsuperscript{231} Id.
\textsuperscript{232} 25 U.S.C. 3001, et seq.
\textsuperscript{233} La. R.S. 8:308, 8:903, and 8:903.1.
\textsuperscript{234} There is no law on this, but the absence of any such requirements in La. R.S. 8:308, 8:903, and 8:903.1 make clear that this was not the Legislature’s intent with those laws.
\textsuperscript{235} This statement refers to the reality that most federal law requires a tie to federal or tribal land or to federal funds or activities to have effect and to the reality that State law protections for cemeteries, aside from the Unmarked Burials Act, can only apply to archaeological sites on State land.
\textsuperscript{236} This statement is consistent with the general idea that the loss of historic resources, which are irreplaceable, represents a significant loss to culture as a whole. As with traditional archaeological sites, cemeteries contain important information on the lives of past peoples – both through the visible markers and the less visible human remains. Lynette Strangstad, A GRAVEYARD PRESERVATION PRIMER, 87 (Altamira 1995). Indeed, through the cultural information that can be gleaned from cemeteries, one scholar of Louisiana’s necropolises has called them “a microcosmic representation of Louisiana culture.” Tadashi Nakagawa, Louisiana Cemeteries: Manifestations of Regional and Denominational Identity, in Richard E. Meyer (ed.), MARKERS XI, 29 (1994). The notion of
IV. Discussion

The foregoing analysis demonstrates that a complex scheme to support some level of preservation exists within virtually all cemeteries in Louisiana, but that much of that protection is minimal. Cobbling together Titles 8, 14, and 41 of the Louisiana Revised Statutes, as well as various federal laws, the authors cannot conceive of any cemetery in Louisiana that is not cemeteries as scientific data sources is not new. Indeed, archaeologists have been testing methods and theories in historic cemeteries for some time. See e.g., Paula J. Fenza, Communities of the Dead: Tombstones as a Reflection of Social Organization, in Theodore Chase (ed.), MARKERS VI, 137 (1989). Even if well-intentioned restoration or reuse activities occur in these cemeteries, the alteration of the historic record without documentation results in a loss of this information forever. Strangstad, supra.

The scientific value of the study of human remains cannot be understated. See e.g., Elizabeth Weiss, REBURYING THE PAST: THE EFFECTS OF REPATRIATION AND REBURIAL ON SCIENTIFIC INQUIRY, 5-23 (Nova Science Publishers 2008). The uses of these remains can largely be divided into two categories: the study of general human history and medical/forensic applications. Seidemann (2004), supra, n.152 at 550. Specifically, as Seidemann has noted,

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

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

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

Id. At 551-553 (citations omitted). See also, English Heritage, GUIDANCE FOR BEST PRACTICES FOR TREATMENT OF HUMAN REMAINS EXCAVATED FROM CHRISTIAN BURIAL GROUNDS IN ENGLAND, 10 (English Heritage and The Church of England 2005). It is doubtful that La. R.S. 14:101 restricts scientific analysis even for remains that are simply being removed for the purposes of reburial elsewhere. This likely does not rise to the level of desecration. However, it is also important to note that, even when remains are removed pursuant to a Title 8 court order, there is nothing that requires scientific analysis of those materials, thus causing the loss of information.
afforded at least some measure of preservation-related protection. However, the weaknesses of law such as La. R.S. 8:308, 8:903, and 8:903.1 for requiring historically accurate restorations, not to mention the costs involved and other problems beyond the scope of the existing law, makes many of these protections theoretical rather than actual.

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

A. Demolition by Descendants

As has been noted at length in previous sections, if a cemetery is not subject to the jurisdiction of the Unmarked Burials Act, the restrictions against demolition of grave spaces under La. R.S. 8:308, 8:903, and 8:903.1 apply. However, because descendants occupy a unique place of control over the final resting places of their ancestors and because descendants are not
so barred by law, there is no reason why descendants could not order the demolition of a grave space, so long as the rules related to the treatment of human remains are followed.\footnote{There is no positive law on this point. However, because Title 8 does not explicitly place restrictions on descendants to keep them from modifying grave spaces, it can be inferred that such a right exists for descendants. This concept is also consistent with the pronouncements of the Louisiana courts. Although never addressing this issue, the courts have consistently found in favor of descendants for wrongs done to graves. \textit{See e.g.}, Humphreys, \textit{supra}, n.95; \textit{see also}, Choppin, \textit{supra}, n.186. One caveat must be borne in mind, as was seen in the cases involving the control of human remains, descendants can often disagree regarding the proper treatment of cemetery matters. \textit{See e.g.}, Byrd, Dufour, and Speiss, \textit{supra}, n.98. Thus, in order for descendants to avoid lawsuits from their relatives, it is advisable that all, or as many as possible, descendants should approve of any demolition in writing before such activities commence.}

The situation that results from this legal loophole is that, without regard to the historic or architectural importance of a grave space, descendants may tear that space apart for reuse or reconstruction as they see fit. The reality of this situation is that the descendants’ information is lost along with the potential social and scientific treasure of the grave marker itself. The harm done to society-at-large by this destruction allowance could easily be minimized by statute by requiring complete documentation of a grave space before renovation or demolition. Such documentation should include transcription of inscriptions and collection of demographic data as well as photographing and drawing the grave space according to architectural standards. The impingement of such requirements on descendants would likely be minimal enough to pass constitutional muster (as it is not restricting reuse, but merely conditioning it).\footnote{The Louisiana courts have been fairly amenable to legislation that imposes restrictions on private property for the general betterment of the public at large. \textit{See e.g.}, \textit{MJ Farms, Ltd. v. Exxon Mobil Corp.}, 2007-2371 (La. 7/1/08) – So.2d – (where the Louisiana Supreme Court found no constitutional violations of a recent act that imposed some delays and extra obligations on landowners that sue for certain environmental damages to their property). The impositions embodied in Act 312 of 2006 are much more substantial than those suggested herein, thus making these even stronger candidates for passing constitutional muster than those imposed by Act 312 (which was maintained as constitutional by a unanimous court).} One proposal for such legislation is as follows:

\textbf{R.S. 8:903.2; Documentation of grave spaces}

A. Prior to any demolition or substantive renovations permitted by this Title, each grave space in the state shall be documented according to the following minimum standards:
1. Black and white and color photographs shall be taken of each elevation of an above-ground grave marker or structure and of each exposed surface of an in-ground grave marker;

2. Architectural plans shall be drawn of all grave markers;

3. All inscriptions shall be photographed and recorded;

4. All demographic data shall be recorded; and

5. GPS locational data shall be recorded for each grave space.

B. All information so collected shall be filed with the Louisiana Division of Archaeology.

   The Louisiana Division of Archaeology shall create an archaeological site file for each distinct cemetery for which data have been filed within which to store the filed information.

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

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

**B. There is at least one person who cares**

A perennial question when cemetery damage that has gone unrepaired is discovered is: “Isn’t there someone who takes care of this?”240 In many cases, the answer to this question is “no”. Abandoned cemeteries are called “abandoned” for a reason – there is little or no burial and upkeep activity and no one to undertake such activity. With countless abandoned cemeteries around the State, when damage or vandalism occurs, it may go unnoticed for years.241 Naturally,


241 Such was precisely the case with recently discovered vandalism and decay in a West Baton Rouge cemetery. In this instance, local residents near the Silvery Cemetery in Port Allen reported destruction of an abandoned cemetery
when descendants of those interred in such cemeteries do notice the damage, they often become upset and look for someone to remedy the problem. However, as has been discussed, at length, above, although the LCB and the Division may have permitting or other regulatory authority over many cemeteries in Louisiana, neither entity, nor any other governmental entity for that matter, has the authority or wherewithal to repair damaged or vandalized cemeteries.

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

Even in cases where perpetual care trust funds exist, it is not unheard of for those funds to be underfunded or misused, thus leading to a lack of cemetery upkeep. In such situations, the

to the news media. When representatives of the West Baton Rouge Coroner’s Office and the Louisiana Department of Justice visited the site, it was apparent that the destruction, which appeared to be a combination of vandalism and neglect-related decay had occurred long before it was noticed by anyone.


This notion is embodied in La. R.S. 8:905, which allows many Louisiana municipalities to enact ordinances requiring such upkeep by cemetery owners.


LCB has regulatory and legal authority to take action against such a cemetery.\textsuperscript{246} In addition, as noted above, the descendants of those who paid for perpetual care would also have an action against the cemetery authority.\textsuperscript{247} If the necessary funds have been squandered, it is questionable what good private actions might do in this situation and likely that all that the LCB could hope for would be stopping continued violations of the law. Any criminal prosecution, while providing the descendants with some measure of vindication, would generally be at the discretion of the local district attorney (and secondarily the Attorney General) and would be unlikely to lead to restitution.

In the situations in which a municipality or other political subdivision is the owner – either outright of through abandonment – of a cemetery, a mandamus action for upkeep may be available if a legal obligation for maintenance by the cemetery authority can be identified.\textsuperscript{248} In the absence of such an obligation or when the cemetery is privately owned,\textsuperscript{249} such an action would not be available and only actions to enforce specific contracts would be available.

There appears to be no easy or reasonable fix for the problem of the absence of a cemetery caretaker. As will be discussed later, the funding issue has been addressed, with disappointing results. In 2008, the Louisiana Legislature considered two bills that would limit the establishment of new cemeteries under a certain acreage in area.\textsuperscript{250} Ostensibly, the general idea behind this restriction was to limit the number of small cemeteries that quickly become...
uncared for and derelict. These bills failed in committee. Even if the bills had passed, they still would not have provided oversight over existing abandoned cemeteries for the purposes of maintenance. 251 Under the legal structure that has existed throughout Louisiana’s history, it would be virtually impossible to go back and appoint caretakers for abandoned cemeteries where none had been required before. 252

C. Preservation/Restoration does not cost much

As was noted above, funding is often a significant issue when accurate cemetery preservation or restoration is the end goal. 253 Even simple maintenance can often be costly. 254 In terms of accurate preservation, though, a permanent funding source must be identified or created. As was also noted above, in perpetual care cemeteries, when the perpetual care system works correctly, maintenance and even some restoration work may be doable. However, there is no ready source of funding for preservation or maintenance for abandoned cemeteries and non-perpetual care cemeteries. 255 In 2007 and 2008, legislation was introduced in Louisiana to create such a fund. 256 The source of funding, has the 2008 legislation passed, would have been an

251 The bills would only have restricted the prospective establishment of smaller cemeteries. It would not have done anything for the problems related to existing small and abandoned cemeteries. SB 345 and HB 729, supra, n.250.
252 Such a law with retroactive effect would impose duties in violation of the ex post facto provisions of both the United States and Louisiana constitutions. See, U.S. Const. Art. I, Sec. 9 and La. Const. Art. I, Sec. 23. Though, admittedly, certain retroactive laws are permitted. See e.g., M.J. Farms, supra, n.239. However, they are only permitted when they effect only procedural and not substantive rights. Id. Such would not be the case here.
254 See, Edward J. Defort, A Religious Experience, AM. CEM. 3 (Mar. 2004) (commenting on the costs of cemetery maintenance); see also, Marilyn K. Alaimo and Laura A. Turansick, Preserving the Past and Planning the Future of a Cemetery, AM. CEM. 24 (Jan. 2004) (discussing the increasing burden of maintaining a cemetery over time). See also, Rachel Witwer, personal communication, Feb. 17, 2009 (commenting that “simple maintenance/upkeep is a burden”) (e-mail on file with authors).
255 Greg Garland, Gustav Disturbs Even the Dead: Burial Vaults Damaged, THE ADVOCATE (Baton Rouge) 1B (Dec. 14, 2008) (noting that no funding mechanism exists for the restoration or maintenance of abandoned cemeteries). See also, Rachel Witwer, personal communication, Feb. 17, 2009 (commenting on the general lack of availability of funding for cemetery preservation projects and also noting that “restoration/preservation funds are not usually available for on-going maintenance which means that it’s a good chance that a restoration project can fall back into disrepair.”) (e-mail on file with authors).
additional amount added to the State-mandated burial transit permit.\footnote{HB 1334, Sec. 1. SB 302 did not designate a funding source aside from grants to the fund.} The proposed cost increase would be $10.00 per permit, an amount that represents a tiny fraction of the overall cost of funeral services today.\footnote{Id. See also, Rachel Witwer, personal communication, Feb. 17, 2009 (e-mail on file with authors).} These monies would be doled out to applicant cemeteries based upon need and other factors in the manner of grants.\footnote{HB 1334, Sec. 1.} This funding source was seen as a disfavored method of providing for cemetery preservation and the bills never got any traction.\footnote{Rachel Witwer, personal communication, Feb. 17, 2009 (e-mail on file with authors).}

The attendant problem to the lack of a funding source such as that proposed in 2007 and 2008 is the lack of general historic preservation funding sources for cemeteries.\footnote{Such funding problems are perennial for historic cemeteries. See e.g., Thomas A. Parmalee, \textit{New Opportunities}, AM. CEM. 22, 25 (Jan. 2009) (noting funding problems in New Jersey for the historic Steelmantown Cemetery); see also, Susan Olsen, \textit{Outdoor Museums: Cemetery Success in the World of Fundraising}, AM. CEM. 22, 22 (Sept. 2008) (commenting on the competitiveness of acquiring such funds).} Such problems are not limited to abandoned cemeteries. With respect to funding for historic resources in operating cemeteries, the cemetery industry has also commented on the difficulty of raising funds to support monument restoration, research and archival projects, educational programming and initiatives to plant trees and preserve the landscape of the cemetery.\footnote{Olsen, \textit{supra}, n.261 at 22.}

Without a regular source of funding to be available for cemetery preservation, the problems of degradation and deterioration will continue in Louisiana.

Another component that must be considered when proposing that funding be available for historic cemetery restoration and preservation is the relationship of perpetual care cemeteries to the historic treasures within their control.\footnote{\textit{Id.}} By simply requiring that restoration be accomplished in perpetual care cemeteries using only perpetual care funds ignores the possibility that sometimes the widespread deterioration within cemeteries will be more expensive to
accurately repair than a perpetual care fund can support.\(^{264}\) Although perpetual care funds should serve as the primary basis for repairs in cemeteries in which such funds are available, restoration funds should be available for substantial undertakings in perpetual care cemeteries as well. Such a scenario would assist in making such a funding proposal more palatable to the cemetery industry.\(^{265}\)

It is imperative that all cemeteries have access to reconstruction funding. Even the perpetual care cemeteries are storehouses of our shared cultural heritage\(^{266}\) and to deny funding to such cemeteries merely based on their classification as perpetual care cemeteries could cause untoward consequences for that heritage.

D. **Humans are always the direct cause of cemetery destruction**

The great bulk of the protections for cemeteries in Louisiana discussed herein assume that alterations to the cemeteries are done at the hands of people. For example, La. R.S. 8:308, La. R.S. 8:671, et seq., La. R.S. 8:903, and La. R.S. 8:903.1 all regulate what people can and cannot do to various types of cemeteries. However, as Hurricanes Katrina, Rita, Gustav, and Ike have taught us, a considerable amount of the damage to cemeteries that people are restricted from doing can also be occasioned by the uncontrollable forces of nature.\(^{267}\) The damage that these storms have caused to cemeteries in Louisiana has been the subject of much discussion.

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\(^{264}\) The reality that perpetual care funds may not be sufficient to cover historic preservation efforts in cemeteries is compounded when one considers that the availability of such funds are subject to market fluctuations. See generally, Daniel M. Isard, *Facing Down the Economy: What You Need to Do to Survive*, Am. CEM. 14 (Jan. 2009) (noting that “the interest earnings many cemeteries have depended on will not be there” when the financial markets are in bad shape). This is because, by law, the principle in perpetual trust accounts cannot be invaded and it is the interest on these funds that is used to do routine maintenance and other restoration work. Because many such funds are investment-based, the available interest will diminish in hard economic times.

\(^{265}\) See, testimony of Mr. Boyd Mott, Chairman, Louisiana Funeral Directors Association, HB 1092, 2008 Reg. Sess., La. Legis., considered before the House Committee on Municipal, Parochial, and Cultural Affairs, 2008, at 46:00.

\(^{266}\) See e.g., Henri A. Gandolfo, *METAIRIE CEMETERY: AN HISTORICAL MEMOIR* (Stewart Enterprises, Inc. 1981) (reviewing the volumes of New Orleans history contained within the perpetual care cemetery, Metairie Cemetery).

\(^{267}\) In addition to Louisiana, cemeteries in the rest of the Nation are not immune to natural disaster damage. See e.g., Minda Powers-Douglas, *Chippiaonock Cemetery’s Storm of the Century*, EPITAPHS 6 (Fall/Winter 2008) (describing storm damage in an Illinois cemetery).
elsewhere and ranges from trees falling on tombs to storm surges moving grave contents over vast areas. When this type of damage occurs, no amount of regulation can have any impact on minimizing the destruction. However, a whole different suite of laws comes into play when such damage does occur. A brief review of the relevant issues and law is prudent here.

Natural disasters, among other forces, have proven, on numerous occasions, that human remains can and will become disinterred and sometimes they will be forcibly moved to a new location. When this occurs, the Federal Emergency Management Administration (“FEMA”) laws and regulations become extremely important. Unfortunately, FEMA rules merely classify human remains and cemetery artifacts as a form of debris. For this reason, cemeteries must be considered in the broader context of debris for the purposes of understanding what the law requires and will allow for in the wake of a natural disaster.

1. The Stafford Act

The Robert T. Stafford Act (“the Stafford Act”), originally enacted as the Disaster Relief Act of 1974, provides broad authority for FEMA to assist local governments with debris removal. The primary provision of the Stafford Act that FEMA trots out for disaster-related

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268 See e.g., Seidemann, supra, n.20.
269 See e.g., Gates, supra, n.242.
271 That said, the Louisiana Legislature did charge the LCB with the duty of developing recommendations for minimizing such damage in the future in the wake of Hurricanes Katrina and Rita. SCR 60 of 2006. A report in response to this charge was completed by the LCB in 2007 and is available online from the LCB’s Web site. Although, if any of the recommendations are implemented, storm damage may be minimized in the future for new interments, it is unlikely that these recommendations will help in minimizing damage to existing interments.
272 See e.g., Seidemann, supra, note 20.
273 See e.g., Anser Analytic Services, Inc., LOUISIANA FAMILY ASSISTANCE CENTER CEMETARY REINTERNMENT ASSESSMENT, 4 (ANSER 2006) (noting that, because the Stafford Act does not contain language to deal with cemetery reinterment, such matters have “been dealt with by analogy to the rules, policies and procedures applicable to debris removal.” Id. [emphasis in original]).
274 P.L. 93-288. The name was changed to the Stafford Act by P.L. 100-707.
debris matters is Section 403(A)(2). This provision allows the President to authorize grants to “any state or local government for the purpose of removing debris and wreckage resulting from a major disaster from publicly or privately owned lands and waters.” At first blush, this provision appears to be a godsend for local governments that are inundated with debris and debt – not to mention destroyed cemeteries – following a disaster. As can be seen infra, the same picture emerges from the regulations promulgated pursuant to Stafford Act authority. However, as FEMA makes clear in its internal rules and publications, the facially simple process for securing certain types of debris removal reimbursement grants, especially for debris removed from private property, is not simple in reality. This reality becomes extremely important for cemeteries, as many are located on private property. The actual application of the law and regulations becomes convoluted as it works its way through FEMA’s process. This makes navigation of the specific requirements to ensure that reimbursement does occur difficult. However, the understanding of these provisions is essential for embattled local governments to assure that they can afford to undertake even minimal restoration projects within cemeteries.

2. FEMA Rules and Regulations

The regulations that control reimbursement for debris removal from FEMA are found at 44 CFR 206.224. Part (a) of this Section reads that,

[u]pon a determination that debris removal is in the public interest, the Regional Director may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters.

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277 Id.
278 See e.g., FEMA, Recovery Division Policy Number 9523.13 at ¶ 7(A). Copy on file with authors.
279 44 CFR 206.224(a).
Although this portion of the regulation largely parrots the debris removal provisions of the Stafford Act, it does not go on to detail what is meant by “public interest.” This term is explicated in 44 CFR 206.224(a)(1-4), thus:

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

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

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

This singling out of private property, though not seeming to imply any different approach from public property, does indicate that FEMA intends to treat private property differently from public property. In addition to this oddity, the “may provide” language in 44 CFR 206.224(a) gives Regional FEMA Directors broad discretion to condition the award of reimbursement funds

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280 Id. (in pertinent part).
281 44 CFR 206.224(b).
for local governments, complicating the cleanup process by ensuring that no cleanup will follow the exact same rules for each disaster. As a practical matter, even though the Regional Directors have latitude to vary, the requirements are often the same.

Pending approval by a Regional Director, cleanup on public property is easily reimbursable. Generally, this should be broadly approved, with reimbursement proceeding according to a fixed schedule, at the outset of cleanup operations, allowing for debris removal from public roads and waterways, among other things, to proceed post-haste.\textsuperscript{282} Thus, although local governments should not rely on history to assure them that they will be reimbursed for expenditures for cleanup on public property (due to the broad discretion granted to the Regional Directors to provide such assistance), there is a reasonable expectation that, pursuant to a declared emergency, such reimbursement will be authorized by FEMA.\textsuperscript{283} Thus, for cleanup of damage in public cemeteries, there is little risk to local governments’ expenditure of funds.

The same situation does not exist for debris removal from private property. Generally, FEMA requires private property owners to utilize their own resources to cleanup their private property.\textsuperscript{284} The assumption behind this approach is that, unlike local governments who might be self-insured or whose operation is necessary for the continued function of an area, damage to private property is typically insured and its rapid cleanup is not always necessary to ensure the economic and social viability of an area.\textsuperscript{285} Basically, FEMA does not want to pay if someone else will pay. However, FEMA does contemplate that local governments may, under extreme

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\textsuperscript{282} See \textit{e.g.}, FEMA, FEMA-322: \textsc{Public Assistance Guide}, 45 (1999).
\textsuperscript{283} Abbott also cautions that municipalities should wait for FEMA clearance for debris removal to ensure that funds are available. Ernest B. Abbott, \textit{Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues}, 37 \textsc{Urb. Law.} 467, 482-483 (2005).
\textsuperscript{284} FEMA, \textit{supra}, note 282 at 46.
\textsuperscript{285} \textit{Id.} An example of private property debris removal that would not be essential for the recovery process of a community to proceed would be a few fallen tree limbs in the yards of private residences. Such debris may be obnoxious to the landowners, but its removal is by no means essential to the function of society.
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circumstances, have to pay for (and thus will need reimbursement for) the cleanup of certain private property. FEMA recognizes this possibility thus:

[i]f debris on private business and residential property is so widespread that public health, safety, or the economic recovery of the community is threatened, the actual removal of debris from the private property may be eligible...Debris removal from private property shall not take place until the State or local government has agreed in writing to indemnify FEMA from a claim arising from such removal and obtained unconditional authorization to remove the debris from private property. 286

So, what then is the problem? Why is it so complicated to initiate cleanup operations on private property (including cemeteries)? The answer to this lies in the policy statements issued by FEMA following a disaster that set forth the requirements for obtaining approval for FEMA reimbursement for conducting debris operations of private property. 287 Part of the boilerplate language of these agreements require that all local laws must be complied with in the execution of debris cleanup. The punishment for noncompliance is that the local governments will not be reimbursed by FEMA for their share of the expenses. 288

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

What is meant by compliance with local laws? Generally, this means that any local or state laws that set forth the law and regulations for the handling of cemetery property and human

286 Id.
287 See e.g., FEMA, Recovery Division Policy Number 9523.13. This document notes that local laws must be complied with in order for approval to be granted. Id. at ¶7(C). It also notes that the affected states’ attorneys general must prepare a document that discusses and analyzes the constitutional and statutory authority for right-of-entry, demolition, and debris removal on private property in the event that the local and state laws cannot be complied with due to extenuating circumstances. Id. at ¶7(F). Copy on file with authors.
288 See e.g., FEMA, supra, note 282 at 90 (noting that “FEMA may be required to deobligate funds after the initiation of a project” for failure to comply with certain laws).
remains must be obeyed. In times of emergency, these requirements can be burdensome, if not impossible, to comply with and difficult to navigate with the precision and expediency necessary to return life to a state of normalcy. Additionally, the cost of following state statutes or local ordinances that typically apply to cemeteries and human remains is often unduly expensive.

Even when all of the pertinent laws have been complied with, FEMA reimbursement for the services provided by local governments for cemetery-related work is by no means absolute or comprehensive. Admittedly, FEMA does provide for some amount of identification to be done on disinterred human remains, but not much. It is apparent, though, that the classification of remains as debris is pervasive within FEMA in a Sapir-Whorfian manner. The semantics of this classification appear to give FEMA the perceived authority to treat these deceased human beings as nothing more than discarded refrigerators. The practical effect of this is that remains are subjected to minimal identification analysis and then pushed off on the local governments from whence they came for handling. No funding is provided for DNA analysis, intensive forensic anthropological analysis, or reburial in anything other than a public cemetery.

289 See FEMA, Recovery Division Policy Number 9523.13.
290 In this situation, compliance with the applicable laws would mean compliance with all of the federal and State cemetery and human remains laws discussed in this article.
291 FEMA, Hurricanes Katrina and Rita, FEMA-DR-1603/1607-LA Information Sheet #007 at 2 (FEMA 2006).
292 The theory referenced here is a concept in linguistic anthropology, known as the Sapir-Whorf Hypothesis, that basically holds that language constrains thought and action. Stanley R. Barrett, ANTHROPOLOGY: A STUDENT’S GUIDE TO THEORY AND METHOD, 20 (Univ. of Toronto Press 1997). The theory was based on Benjamin Lee Whorf’s observations of workers carelessly handling fuel drums labeled as “empty,” when, in fact, they were anything but empty. The workers were lulled into a false sense of safety by the “empty” label on the drums when, in fact, the drums contained highly explosive fumes that were much more dangerous than the liquid fuel that made up their original contents. In this situation, language (i.e., “empty”) directed the workers to act a certain way towards the drums. Benjamin Lee Whorf, The Relation of Habitual Thought and Behavior to Language in John B. Carroll (ed.), LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF, 135 (Technology Press 1997). Similarly, at FEMA, because human remains are labeled as debris, they are treated with about as much respect. This helps to explain the attitude that lets hundreds of unidentified human remains that were disinterred during Hurricanes Katrina and Rita sit in warehouses with little or no effort to return them to rest. Why bother? It’s just debris.
(regardless of the cemetery of origin). This reburial problem becomes acute when one realizes that there are few true “public cemeteries” and that many of the abandoned cemeteries that are damaged by natural disasters would actually be classified as “private cemeteries” by FEMA. Thus, although human remains may be found miles from where they were once interred, FEMA will not cover the costs of returning them to their place of origin if that place of origin could be classified as a “private cemetery.”

One possible means for dealing with the reburial problem, because FEMA will only pay for reburial in a “public cemetery,” we suggest that Louisiana statutorily redefine “public cemeteries.” We propose the following language to accomplish this goal.

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

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

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293 See FEMA Information Sheet #007, supra, n. 289.
294 Such a reclassification is not without support in the jurisprudence. In In Re Provident General Corp. v. AMI, Inc., 33 B.R. 241, 244 (U.S. Bankruptcy Ct., W.D. La. 1983), Judge Bernard found that a privately owned cemetery was nonetheless properly classified as a public cemetery due to its openness and service to the public and the lack of restrictions (save paying interment fees and purchasing rights to a plot) for interring people therein. Id. Cf., La. Atty. Gen. Op. No. 90-630, which narrowly defines the term “public cemetery.” This narrow definition seems to be outdated and inconsistent with the jurisprudence. That said, it was likely not the intent of the Attorney General’s Office to address the issues raised herein related to disasters in this opinion. Thus, the opinion may not be completely incorrect.
The functional significance of this definition, which is supported by some jurisprudence, is that all cemeteries that have open burials (i.e., anyone from the public who can pay can be buried there) will be considered “public” whether publicly or privately owned. It is hoped, though it has not yet been tested, that this semantic difference will allow FEMA to allocate funding for reburial even in privately-owned cemeteries.

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

3. A note on State law issues related to cemetery destruction from natural disasters

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

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

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295 Id.
E. Dealing with People that Unintentionally Destroy or Damage Cemeteries

Although much of this paper has addressed damage to cemeteries due to abandonment, neglect, vandalism, and even natural disasters, these are not the only threats to these historic resources. Recent events have demonstrated that, as has been noted periodically throughout this article, well-intentioned restoration efforts that are done poorly can be equally destructive to the other forces noted above. Examples of this destruction are recent attempts to repair deterioration and vandalism damage in the Odd Fellows Rest cemetery in New Orleans\(^\text{299}\) and the recent attempts to repair deteriorated tombs in the Mt. Bethel Baptist Church Cemetery in Carville, Louisiana.\(^\text{300}\)

In the Odd Fellows Rest situation, cleanup workers were using pressure washers to remove grime from 200-300-year-old markers and monuments.\(^\text{301}\) This practice is unacceptable, as it destroys these historic artifacts and the information contained on them.\(^\text{302}\) The situation at Mt. Bethel Cemetery was even worse. In this cemetery, “restoration” work was accomplished by using a backhoe to tear down derelict above-ground tombs.\(^\text{303}\) The bricks from two tombs were piled in the corner of the cemetery and cement slabs were put in their place before news reports caused the workers to change their practices.\(^\text{304}\) Subsequent archaeological investigations of the pile of rubble identified more than 100 fragments of human bone as well as coffin parts and other


\(^{302}\) Witwer, *supra*, n.12, at 44.

\(^{303}\) Williams, *supra*, n. 300.

\(^{304}\) *Id*. 
The remainder of the “restorations” were accomplished by encasing entire above-ground tombs in concrete. Obvious Title 8 violations aside, these actions in Mt. Bethel Cemetery have destroyed or obscured all historically-useful information from the graves and have caused substantial distress for the descendants of those interred in the disturbed graves.

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

Title 8

§ 79. Certification program for work in cemeteries.

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

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

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

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305 See generally, Ryan M. Seidemann, Analysis of Human Remains and Artifacts Recovered from Cemetery Repairs at Mt. Bethel Baptist Church Cemetery, Carville, Louisiana (Louisiana Department of Justice 2009).
7. individuals possessing a graduate degree in historic preservation or an allied field of study.

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

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

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

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

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

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

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

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

V. Shoring Up Protection

Although a combination of Louisiana and federal law provides some measure of
protection for historic cemeteries, the protection provided is neither complete nor enough. As
has been demonstrated, there are gaps in the existing protections and the continued existence of
these gaps creates a constant threat to our cultural heritage.\textsuperscript{306} Based upon the foregoing review,
the major gaps in the legal protection of cemeteries in Louisiana are:

\textsuperscript{306} Assuming, \textit{arguendo}, that what we believe to be the incorrect interpretation of the “marked” versus “unmarked”
burials distinction (discussed \textit{supra}) is followed, this gap is larger than the gap that we believe exists under the
1) Lack of a special status of cemeteries under the NHPA;
2) Lack of funding available for historic cemetery preservation or restoration;
3) The absence of historic preservation requirements in La. R.S. 8:308, 8:903, and 8:903.1. 

Other problems relate to the classification of such property in times of disaster and the proper documentation of historic graves when they are slated for alteration. These latter problems were discussed above, along with legislative proposals intended to remedy them. Accordingly, no further consideration of these matters is undertaken. The following are proposals for remedying the other problems enumerated above.

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

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

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

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

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

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

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correct interpretation. If the former (i.e., incorrect) interpretation is ever accepted by a court in this State, substantial legislation will be necessary to fill the gaps. In this regard, we believe that legislation along the lines of H.B. 1092 of 2008 would be appropriate. However, if, as we believe, the protections in H.B. 1092 already exist in the Unmarked Burials Act, such protections would be duplicative. That said, there will always be a need for funding to support preservation and protection efforts.
As King notes, cemeteries can be shoehorned into one of these categories. However, due to the sacred nature of such places and the stores of historic and cultural information that they contain, cemeteries should not be relegated to such shoehorning. Very simply, the NPS could add a fifth category to the National Register eligibility criteria that would assure some level of federal protection for such important spaces that does not require inventive nominations in an attempt to squeeze important sites into the protection that comes with National Register listing or eligibility. In this regard, we propose the following:

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

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

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307 Supra, n.22, at 81.
308 See e.g., Probst v. City of New Orleans, 337 So.2d 1081, 1084-1085 (La. 1976) (commenting that, “building alteration and demolition [in the French Quarter] are prohibited without approval of the Vieux Carre Commission.”). Such alteration restrictions are typical of structures on the National Register.
309 See e.g., Olsen, supra, n.261.
310 An example of such a situation is Magnolia Cemetery in Baton Rouge, which was admitted to the National Register in 1985. 51 F.R. 6626-01. The nomination form for this cemetery notes usage (and thus alterations to the cemetery’s historic integrity) with just a few years of the nomination. See, National Register of Historic Places Inventory – Nomination Form, Magnolia Cemetery, Baton Rouge (documents on file with the authors). Thus, there is at least some precedent for the NPS to allow for cemeteries to be listed on the National Register and also be operating cemeteries.
adherence to conservation standards when any repair or modification must be made to the historic portions.

As noted above, the lack of funding to support cemetery restoration activities is, at best, hard to come by. This appears to stand as the most significant obstacle to protecting these sites. This problem has been discussed above. What is considered here is potential fixes to this problem.

In both 2007 and 2008, the Louisiana Legislature considered bills that would provide such funding.\(^{311}\) These bills did not succeed. We believe that a new version of the 2008 bill, which contains a specific funding source, should be reintroduced and reconsidered in light of the problems discussed herein. The funding source – the burial transit permit – does not constitute a significant burden on parties to a funeral such that it should be discounted as a viable source out of hand. Additional funding sources could be an increase in the death certificate costs or, perhaps more palatable, a fee attached to tourism activities, such as hotel/motel stays, in Louisiana, as many historic cemeteries represent a significant tourist draw for the State.\(^{312}\) Accordingly, although the funding source should perhaps be revisited, we are of the belief that legislation similar to HB 1334 of 2008 should be seriously reconsidered and enacted.

There are two other potentially promising sources for funding to assist in cemetery preservation or restoration. One of these sources would be to extend the tax incentives provided by DHP for the restoration and maintenance of historic structures to cemeteries.\(^{313}\) As has been noted above, such approaches have been successful in other areas of conservation.\(^{314}\) These tax incentives may provide a substantially attractive opportunity for operating cemeteries with

\(^{312}\) See e.g., Florence, supra, n.18; see also, Bleiberg, supra, n.18.
\(^{313}\) La. R.S. 47:4311, et seq.
\(^{314}\) See e.g., Seidemann & Susman, supra, n.180.
historic components, because, as Mitford has aptly noted,\textsuperscript{315} many of these entities are, first and foremost, for-profit businesses for which tax breaks would be advantageous.\textsuperscript{316}

One final funding proposal derives from New Jersey’s Historic Cemeteries Act.\textsuperscript{317} Under this law, local governments may provide funds for historic cemetery preservation and restoration. It is clear from this Act that the law is aimed at assisting in the protection of private historic cemeteries.\textsuperscript{318} A similar law could be used in Louisiana to assist in necessary repairs where, in situations such as those cited from West Baton Rouge Parish, human remains are exposed or where the public’s health, safety, or welfare are at risk due to cemeteries in disrepair. Due to the limited budgets of most local governments, the uses of such a fund should be narrowly tailored, primarily to be applied to situations such as those with exigent circumstances. In that regard, we proposed a provision for addition to Title 8 (which paraphrases NJ St. 40:10B-3):

\begin{quote}
8:907. Restoration and preservation of historic cemeteries.

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

We would also recommend that such legislation, as does the New Jersey law, should provide for certain caps on expenditures.\textsuperscript{319}

\textsuperscript{315} See, Mitford, \textit{supra}, n.6 at 97-118.
\textsuperscript{317} NJ St. 40:10B-1, \textit{et seq.}
\textsuperscript{318} NJ St. 40:10B-2.
\textsuperscript{319} See e.g., NJ St. 40:10B-3.
One additional note with regard to such use of public funds: Should a law similar to that proposed above be enacted in Louisiana, it will have to be enacted pursuant to a constitutional amendment. Because La. Const. Art. VII, Sec. 14(A) would generally restrict the use of public funds as contemplated in the proposed law, an amendment to this constitutional provision to exempt such uses from the general restrictions would be necessary. Although it sounds substantial, constitutional amendments are fairly common in Louisiana.

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

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

As has been demonstrated herein, there is a substantial amount of law in Louisiana that, when properly used and understood, can assist in historic cemetery protection, preservation, and restoration. With that said, there are still substantial gaps in the law that must be filled in order to ensure the protection of these sacred cultural assets. With the increase in threats to such sites discussed in the Introduction, a serious consideration of means for filling these gaps by lawmakers and regulators is necessary and the implementation of such new laws is now essential before such resources are lost forever.