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Sacred Land for the Living and the Dead:
A Discussion of Particular Law for the Governance of Catholic Cemeteries

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INTRODUCTION

Both the Holy Scriptures and the Catholic Church have always considered cemeteries to be sacred locations, a central part of the life of faith for individuals and for communities. Consistent with the Scriptures, the Church prizes cemeteries as sacred locations, not for their outward show, but rather for their role in advancing prayer, a sense of the communion of saints and the desire for the greater kingdom. From the standpoint of Scripture, all four Gospels celebrate the fact that Joseph of Arimathea offered his burial place for Jesus.¹ Likewise, the holy women are commended for their care in burying Jesus, and in returning on Sunday to complete the dedication of His body.² That burial place then became the site of the triumph of the Resurrection. Thus, the grave is at first a sign of sorrow and remembrance for the dead and then becomes a sign of hope in the Resurrection.

It is true that, when one prospective disciple said that he would follow Jesus, but asked leave to bury his father first, Jesus famously responded, “Let the dead bury their dead.”³ At first sight, Jesus’ rebuke of the young man who wished to bury his father before following Jesus may seem inconsistent with the later reverence for the tomb of Jesus. However, the central problem was not that the man wanted to bury his father, but that he considered that burial to be his *first* duty, above even the call to follow Jesus.⁴ As St. John Chrysostom argued, Jesus was not downplaying respect for the dead, but rather making it clear that nothing is more central than our relationship with Christ; and that even such an important duty as burying the dead should be

¹ Matt. 27:57-61; Mark 15:42-47; Luke 23:50-56; John 19:30-40.

² Mark 16:1-3; Luke 23:55 – 24:1.

³ Matt. 8:22.

⁴ Benedict Viviano, “The Gospel According to Matthew” in *The New Jerome Biblical Commentary*, ed. Raymond Brown et al. (Englewood Cliffs, NJ: Prentice Hall, 1990) 648.

seen in that context.⁵ Church tradition and law have striven to ensure that cemeteries do in fact have that focus, manifesting our faith and encouraging prayers for and with the dead.

From the standpoint of the Church, she has ever maintained that the burial of the dead is one of the corporal works of mercy, for “it honors the children of God, who are temples of the Holy Spirit.”⁶ And thus, from the beginning Christian funeral and burials have joined together both mourning and hope with a noble dignity that avoids the extravagance of the world.⁷ With regard to Catholic cemeteries, the canon law of the Church has maintained and continues to maintain this balance, supporting Catholic cemeteries as places of devotion and prayers for and with those who have gone before us. Following on a tradition that had developed from the beginning of the Church, the 1917 Code had extensive regulation about Catholic burials and cemeteries. The 1983 Code simplified these universal provisions regarding burials and cemeteries. In place of the many of the more extensive rules that apply to the whole Church, canon 1243 called for particular law “to establish appropriate norms about the discipline to be observed in cemeteries, especially with regard to protecting and fostering their sacred character.”⁸ However, despite the fact that the current code is more flexible than the 1917 Code, the ideas and goals it manifested are still applicable, and its provisions are still helpful for the current governance of Catholic cemeteries.

This paper will thus discuss how particular law promulgated under canon 1243 can be most helpful for ensuring the availability and good management of these sacred places,

⁵ *The Navarre Bible: Gospel & Acts*, ed. Jose Casciaro et al. (Dublin: Four Court Press, 2000) 103 n. 22.

⁶ Catechism of the Catholic Church 2nd ed. (Rome: Libreria Editrice Vaticana, 2007) 2300.

⁷ “Burial, Christian” in *Encyclopedia of Catholic Doctrine*, ed. Russell Shaw (Huntington, IN: Our Sunday Visitor 1997) 61, 62.

⁸ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983) c. 276 §2 3^o: “Opportunit normae de disciplina in coemeteriis servanda, praesertim ad eorum indolem sacram tuendam et fovendam quod attinet, iure particulari statuuntur.” English translation from the *Code of Canon Law. Latin-English Edition: New English Translation* (Washington, DC: CLSA, 2012). All subsequent translations from the code will be from this source.

upholding the historic values of Catholic cemeteries in the modern world. Part I will outline the history of the practice and regulation of Catholic cemeteries; it will then describe how that history manifests the theology and insights that have developed with regard to Catholic cemeteries, theology and insights that informs legislation to this day. Part II will discuss the provisions and policies of the 1917 Code with regard to the management of Catholic cemeteries, developments of the 20th century, and the changes enacted in the 1983 Code. Based upon these reflections, some insights from the Catholic Cemetery Conference of the United States, and a review of the particular law of ten dioceses in the United States and Canada, part III will outline some issues that should be addressed in the particular law that governs Catholic cemeteries.

CHAPTER I

AN HISTORICAL REVIEW OF CHURCH POLICY REGARDING CEMETERIES

Adhering to the Biblical precedent set before them, Christians have ever considered it crucial to have their own sacred places to bury their dead. Due to the importance of cemeteries in the life of faith, the Catholic Church soon began promulgating legislation to guide this devotion. This part will briefly describe such devotion and legislation in four eras leading up to the 1917 Code: (1) the Biblical era; (2) the first five centuries of the Church; (3) the Middle Ages; and (4) the response to the Protestant Reformation and the modern era. It will then draw lessons from this history as they are applicable to current law. After the description of the first five centuries, it will also outline the reflections of St. Augustine on the rationale for venerating the graves of the dead.

A. Some of the Biblical Precedents

From the very beginning of the Old Testament, the ancient Jews considered the burial places of the dead to be central to their history and their faith. Thus, when Sarah died, Abraham went out of his way to purchase land for her burial.¹ As the Jewish scholar and bio-ethicist Dr. Leon Kass points out, the very first part of the Holy Land purchased by the Chosen People was thus a gravesite. In particular, Abraham made it clear that he wished to *purchase* the land for her burial, not simply use someone else's land for her grave. "By purchasing a family burial site, Abraham provides as a permanent holding a special place where the ancestors may always 'dwell' among the living, a place of memory and filial piety. . . . Neither birth in native soil – a 'natural

¹ Gen. 23:1-20.

rootedness’ - nor military conquest, but mortality honored through burial provides the Israelites’ first title to the land.”² Thus, the precedent was set for the New Israel, the Church to own and manage her own cemeteries.

As time went on, the place of burial became very important to the ancient Jews.³ For example, on his deathbed Jacob commanded Joseph to bury him in the Promised Land, which he did. Joseph in turn commanded his family that, when the Chosen People would eventually leave Egypt, they would take his bones with them, as they did.⁴ Likewise, the Bible carefully records the burial places of the likes of Miriam, Aaron, and Joshua.⁵ The Book of Genesis also carefully notes that Moses was buried in Moab, but it adds to his mystery that no one knows of his burial place, giving rise to the view that he was assumed into heaven.⁶ Likewise, burying the dead was considered such a sacred duty, such that Tobias shows his faithfulness and courage (as opposed to the fickleness of his neighbors) by burying fellow Israelites who had been put to death by Sennacherib despite his prohibition under penalty of death for doing so.⁷ By contrast, Jeremiah speaks of the punishment that corrupt kings, priests and prophets would endure as their bodies are cast out of their graves and thrown upon the earth.⁸ However, that punishment was in God’s hands, for the ancient Jews considered it their responsibility to bury anyone, even a sinner.⁹ Thus, for example, David commended the men of Jabash for burying Saul, even though he died in battle due to his defiance of the laws of God.¹⁰

² Leon Kass, *The Beginning of Wisdom: Reading Genesis* (Chicago: University of Chicago Press, 2003) 364.

³ Stephen Wickes, “History of Sepulture” in *Cemetery Law: The Common Law of Burying Grounds in the United States* ed. Tanya Marsh and Daniel Gibson (San Bernadino, CA: God’s Acre Publishing, 2015) 49 – 50 (hereafter *Cemetery Law*.)

⁴ Gen. 47:29-31, 50:5, 50:24-26; Ex. 13:19; Joshua 24:32.

⁵ Num. 20:1; Duet. 10:6; Joshua 24:30.

⁶ Gen. 34:6.

⁷ Tob. 1: 18-20, 2:7-8.

⁸ Jer. 8:2.

⁹ Wickes, 50.

¹⁰ 1 Sam. 2:1-8.

This great importance of burying the dead continued into the New Testament era, as Scripture notes that the disciples of John the Baptist carried away his body for burial.¹¹ Jesus likewise came to Lazarus' tomb for mourning and then the raising of the dead.¹² As noted above, the Gospels emphasize the burial place of Jesus as first place where the Resurrection became clear. For its part, Acts of the Apostles specifically notes the early Christians burying their dead, whether did good or evil during their lives.¹³

B. The Early Centuries of the Church

Historical records indicate that, before the Roman persecutions, Christians soon began establishing their own cemeteries for the dead, for some of the ancient monuments had specifically Christian symbols, indicating no fear of persecution.¹⁴ At that time, among both Christians and Roman pagans, the practice was primarily that families would have their own cemeteries in which family members and servants who resided with them would be buried.¹⁵ Christians followed this practice, but with an expansive focus. Thus, for example, wealthier Christians would open up their cemeteries to the faithful at large, especially the poor who could not afford their own graves.¹⁶ In addition, Christian cemeteries were specifically considered symbols of hope in the Resurrection, in contrast to pagan either denials of an afterlife or view

¹¹ Matt. 14:12;

¹² John 11:38

¹³ Acts 5:6, 8:2, 9:37.

¹⁴ Louis Gelineau, *The Regulation of Parochial Cemeteries: A Historical Analysis* (Doctoral Dissertation) (Washington, D.C.: Catholic University of America 1959) 3; John O'Reilly, *Ecclesiastical Sepulture and the New Code of Canon Law* (J.C.D. Dissertation) (Washington, D.C.; Catholic University of America 1923) 5.

¹⁵ O'Reilly, 5-6.

¹⁶ Gelineau, 4. It should also be noted that, among the pagans some wealthy people with a public spirit would also establish separate cemeteries for the general public. Stephen Wickes "History of Sepulture" in *Cemetery Law* 51.

that death was a liberation from the body.¹⁷ In fact it was the Church which coined the term “cemetery” whose etymology comes from the Greek word κοιμητησιον, which means a sleeping place; for Christians knew that not only the soul, but the immortal body was waiting to rise in the Resurrection.¹⁸ As the persecutions broke out, Christians used more underground cemeteries. Such cemeteries eventually become catacombs around ancient Rome, without above ground markers.¹⁹ However, because the Romans usually respected places of the dead, the Christians could generally worship more freely at the cemeteries than elsewhere, although the Roman government did sometimes close cemeteries to Christians to prevent such worship.²⁰ As Reverend Willian Casey, the founder of the National Catholic Cemetery Conference said, “It is especially noteworthy that these catacombs became the Christian churches during the ages of persecution.”²¹

Eventually, associations to establish cemeteries for those who wished to pool resources began among both the pagans and the Christians.²² As these cemeteries became larger and more organized places for devotion and worship, church authorities became more interested in managing or at least governing them.²³ Among other issues was the concern that, due to apostasy by the owner or his heirs privately owned cemeteries could fall into the hands of pagans. As a result, parish priests took more charge over the cemeteries in the parishes that were

¹⁷ Cornelius Power, *The Blessing of Cemeteries: An Historical Synopsis and Commentary* (Doctoral Dissertation) (Washington, D.C.: Catholic University of America 1943) 2-3; Daniel Gibson “Early Christian Practices and Beliefs” in *Cemetery Law* 47.

¹⁸ Power, 2-5; William Casey, “An Infant is Born” in *God’s Acre*, ed. by F.A. Hartman (Des Plaines, IL: National Catholic Cemetery Conference, 1952) 60 (hereafter *God’s Acre*); Bishop Raymond Burke, Pastoral Letter “On the Christian Burial of the Dead,” at www.catholicculture.org/library.

¹⁹ O’Reilly, 7.

²⁰ Gelineau, 3-4, 8; O’Reilly, 6.

²¹ Casey, “An Infant is Born,” 60.

²² Gelineau, 7-8; Samuel Cardinal Stritch, “Eulogy for Rev. William Casey” in *God’s Acre*, xiv.

²³ Stritch, xv-xvi.

being established.²⁴ Thus, for example, when Pope Marcellus divided Rome into 25 titles (precursors to parishes) he did so for the purpose of administering the sacraments and the burial of the martyrs.²⁵ In addition, the Church had to deal with the question of who could be buried in Christian cemeteries. Thus, for example, the rule was that only Christians could be buried in a Christian cemetery.²⁶ The rationale was explained by Pope Leo I in a letter to Rusticus, Bishop of Sarbonnes, a letter which Gratian later included among his canons. Pope Leo I explained that the Church could not maintain communion in death with those who had no communion with her in life.²⁷ While that view may seem narrow now, it emphasized the inherent connection between the Christian cemetery and the Christian faith.

C. Saint Augustine

In his tract *De Cura pro Mortis*, St. Augustine drew lessons from some of the aforementioned Scriptural precedents and early Church practice to describe why we honor burial places. In that work, he responded to a friend who asked whether it benefits the dead to be buried near a saint; and he raised the broader question of why we care for the bodies of the dead, given that faithful lives, not elaborate tombs, lead to salvation.²⁸ He said that we reverence the bodies of the dead for at least four reasons, three of which are devotional and the final one practical. First, the graves of the dead remind us to commend the souls of the dead to God and to remind us of the intercession of the saints.²⁹ Second, the bodies of the faithful are an inspiration

²⁴ Gelineau, 6-7.

²⁵ Ibid., 11-12 (citing Liber Pontificalis cap. XXXI)

²⁶ Gelineau, 12.

²⁷ C. XXIV q.2. c. 1.

²⁸ Augustine, *On the Care to Be Had for the Dead*, translation by H. Brown (Savage, MN: Lighthouse Christian Publishing, 2017).

²⁹ Ibid. 6 – 7, 22.

to use, for they call to mind the goodness of the faithful departed and “are as organs and vessels to all good works their spirit has holily used.” By honoring their graves, we recall that we are still in communion with them.³⁰ St. Augustine even described a noble and salvific mourning that the grave can inspire as it reminds us of the dead and of our longing to be with them.³¹ But this noble grief then leads to joy. For, as St. Augustine describes it, the third reason for reverencing graves is that they manifest hope in the Resurrection. As he points out, if even those who do not believe in the resurrection of the dead reverence their bodies, how much more among Christians is it the case that “an office of this kind bestowed upon a body, dead but yet to rise again and to remain to eternity, may also be a testimony to the same faith.”³² The final reason for reverencing the graves of the dead is a practical one. For, as St. Augustine points out, the desire to be honored after death leads people to live in a fashion worthy of that honor.³³

Saint Augustine cautioned, however, that it is not the elaborateness of the graves, but rather the faith and devotion they inspire that give them value. For, as he wrote, “Right handsome obsequies in the sight of men did that rich man who was clad in purple receive of the crowd of his housefolk. But far more handsome did that poor man who was full of sores obtain by the ministry of angels who bore him not into a marble tomb, but into Abraham’s bosom bore him on high.”³⁴ Likewise, he warns that “if there were a lack of these supplications, which are made with right faith and piety for the dead, I account that it should not a whit profit their spirits, howsoever in holy places the lifeless bodies should be deposited.”³⁵ Thus, Saint Augustine

³⁰ Ibid. 5 - 6.

³¹ Ibid. 11.

³² Ibid. 22.

³³ Ibid. 9. For the most part, St. Augustine put the matter more negatively, saying that the potential punishment of not having one’s body honored will tend to deter unfaithful behavior during life.

³⁴ Ibid. 4.

³⁵ Ibid. 6.

greatly valued the reverent burial of the dead, but in a way that leads to greater devotion and faith, rather than reliance on the extravagance of some burial places.

D. The Middle Ages

During the early Middle Ages, additional issues arose regarding Catholic cemeteries. One issue was the blessing of cemeteries by a bishop. It is not clear whether in the early days of the Church there was a formal blessing of cemeteries.³⁶ However, St. Gregory of Tours plainly indicated that, by his era of the sixth century, such a blessing by the local bishop had become the standard practice for setting aside a cemetery as sacred. In particular, he referred in a letter to an abbess who asked him to come to her diocese to bless a cemetery that had been established for their queen who had just died; for their bishop was away and would certainly approve of St. Gregory filling the role.³⁷ As Cornelius Power points out, the letter assumes that a bishop had to impart the blessing, for the abbess went out of her way to ask St. Gregory to come, rather than have a local priest give the blessing. As the Middle Ages progressed, it became common custom that cemeteries were blessed by a bishop and thus made sacred ground.³⁸ The bishop to impart this blessing would presumptively be the bishop of the local diocese; other bishops could do so only with his permission, which the abbess said could be presumed in the case at hand.³⁹

There was also the question of where cemeteries could be located. Initially, the new Christian governments continued applying the ancient Roman law from the Twelve Tables that

³⁶ Power, 8–14.

³⁷ Ibid. 17.

³⁸ Ibid. 23–24.

³⁹ Ibid. 28 – 30. Other clerics who were not bishops were sometimes given this authority by the local bishop. Ibid. 31 – 36.

burials should not be inside of cities, largely for health reasons.⁴⁰ However, increasingly people wished to be buried in or near churches, and in particular their parish church. This desire came largely from devotional reasons and a desire to be near the saints whose relics were in churches. That issue led to a conflict with the laws preventing burials within city limits; and so the restriction against burials within city limits was gradually lifted.⁴¹ However, church law generally still provided that burials could not be inside the church itself, but rather should be in ground nearby, except for bishops, clergy and sometimes prominent laity. Thus, Gratian says that the ordinary burial place was in a cemetery, with some exceptions for these groups.⁴² The practice of burials in churches continued in many places, despite repeated legislation against it.⁴³ But, as the Middle Ages progressed, church regulation became enforced more often and thus burials within churches became rarer over time.⁴⁴

Another issue was the proper cemetery in which a person was to be buried. There was a strong preference for each parish to have its own cemetery and for the faithful to be buried in the cemetery of the parish where they had lived. The faithful were generally considered free to choose their own burial site, but they were encouraged to be buried at the cemetery of their own parish.⁴⁵ Along these lines, Pope Boniface VIII said that, even if a person died away from his parish, if possible, his body should be brought back to the parish cemetery.⁴⁶ The idea was that it was most fitting that the parish where a person worshipped during his life should be the place where he would be remembered after death.⁴⁷ The burial in the parish cemetery also reflected the duties of the parish for its parishioners, living and dead. As Cardinal Stritch observed in his

⁴⁰ Wickes, 51.

⁴¹ Gelineau, 14; O'Reilly, 7.

⁴² C. XIII q.2 c. 18.

⁴³ Power, 20-21

⁴⁴ Gelineau, 16 – 17.

⁴⁵ X 3.28.10 (citing a decree of Pope Innocent III); *The Regulation of Parochial Cemeteries* 16-17.

⁴⁶ VI C. 3.13.2. Other commentators argued for a burial near the place of death. Cf. Gelineau, 20.

⁴⁷ Gelineau, 26.

eulogy for the founder of the National Catholic Cemetery Conference, “The care of the dead and the bodies of the dead in the churchyard was a part of the parish duty and parish obligation.”⁴⁸

Some of the concern about the place of burial at this time seemed to be over the burial offering, and which parish or religious institute received it. Thus, for example, Pope Leo III issued a decree that, if a person was buried at a place other than his parish, a third of the fee for the burial would be sent to his proper pastor.⁴⁹ Pope Boniface VIII went further and held that, if a person chose a cemetery other than the cemetery of the parish in which he had received sacraments, the canonical portion of the offering should go to his parish church. Moreover, if a person had two domiciles, the canonical portion of the offering should be divided between them. Pope Boniface also threatened penalties, including interdict, on churches that unlawfully buried a person in neither the cemetery of his choice nor the cemetery of his parish; and he forbade clergy from inducing a person to provide for a particular place in his will. The concern was apparently due to clergy or institutes trying to get the offering for such burials, for the penalties would be revoked only when the offering had been made to the proper parish church.⁵⁰ The problem of members of the clergy and religious pressuring people to choose a specific place for their burial became so serious that the Council of Vienna imposed excommunication on any of the clergy who induced people to bind themselves by a vow to be buried in a specific cemetery.⁵¹

There was also the question of whether religious houses could have their own cemeteries. Pope Boniface VIII later said that religious should in fact be buried in the cemetery belonging to their house, unless they died so far from it that a transfer of the body would be difficult.⁵² But there was also the issue of the burial of the faithful in general in the cemeteries of the religious

⁴⁸ Stritch, xvi.

⁴⁹ X.3.28.1; Gelineau, 18.

⁵⁰ VI.3.12.1-2.

⁵¹ Canon 17, Council of Vienna; Galinaeu, 47.

⁵² VI 3.12.5; Gelineau, 29.

houses. In *Nimis iniqua*, Pope Gregory IX noted the objections of many parish priests to religious houses offering burials at their cemeteries, for they accused religious houses of going out of their way to obtain the fees for burials. Pope Gregory IX certainly criticized the excessive desire to obtain such offerings, but he still allowed religious houses to offer the faithful burials at their cemeteries.⁵³ Pope Boniface VIII later more specifically granted the Dominicans and Franciscans this right to bury the faithful. However, in his letter Pope Benedict XI revoked this privilege of religious to have their own cemeteries because it was causing too much conflict with the parish priests. But then his successor Pope Clement V restored the privilege while instructing, as Pope Boniface VIII had done, the religious to give to the parish of the deceased the canonical offering for the burial.⁵⁴

The Church also dealt with the question of maintaining Catholic identity in cemeteries, both with reference to who could be buried in cemeteries and the behavior allowed in them. The former rule that only Catholics could be buried in Catholic cemeteries was maintained with the additional instruction that excommunicants also could not be buried in Catholic cemeteries.⁵⁵ In addition, poor behavior was apparently an issue, for there was legislation against it.⁵⁶ Thus, for example, in the context of forbidding secular affairs in churches, the Second Council of Lyons declared, “No more business is to be conducted in churches or their cemeteries, especially they are not to have the bustle of markets and public squares. All noise of secular courts must be stilled.”⁵⁷ Other church councils even had to forbid dances, ballads and other such extravagant and unfitting behavior in cemeteries.⁵⁸

⁵³ X.5.31.16, X; Galineau, 27.

⁵⁴ Extrav. Comm. 5.7.1; Clem. 3.7.2; Galineau, 29-30.

⁵⁵ C. 13 q.2 c. 28; X 3.28.12-13; Power, 51-53.

⁵⁶ Galineau, 43-44.

⁵⁷ Second Council of Lyons c. 25.

⁵⁸ Galineau, 44.

E. The Modern Era Leading to the 1917 Code

In the modern era, the old issues of where people should be buried and who could own a cemetery continued. But issues also arose regarding the maintenance of the Catholic identity in cemeteries, particularly with regard to behavior in cemeteries and the burial of non-Catholics in them. In addition, with the state playing an increasing role in governing cemeteries, church-state relations became more of a concern.

Regarding the place of burial, the general rule still was that people would be buried in the cemetery of their parish.⁵⁹ Franz Schmalzgrueber described the parish church as the preferred place for a cemetery because: (1) it increases the pious belief of the faithful in the intercession of the saints; (2) it inspires the faithful to have charity towards the dead and thus to pray for them; and (3) it gives people a most salvific reminder of their own mortality.⁶⁰ However, people had the right to be buried in the cemetery of their choice if there was a good reason for choosing a cemetery other than the one of their parish. Thus, the Sacred Congregation for the Council said that pastors may not have a higher burial fee if a parishioner chose to be buried in the cemetery of another parish.⁶¹

In addition, with the rise of third orders and confraternities there was also the question of who should be buried in the cemeteries of religious houses. Thus, example, it was the general understanding that the servants who lived in a monastery could be buried in its cemetery.⁶² By contrast, the Sacred Congregation for the Council held that servants of monasteries who did not

⁵⁹ Glaineau, 36 – 38.

⁶⁰ Franz Schmalzgrueber, *Jus Ecclesiasticum Universum* (Rome: 1726) in typographical edition from Rev. Cam. Apostolicae (Rome: 1844) Book III, title XVIII, ch. 1 n. 2; cf. Galinaeu, 34 – 36 (discussing these goals.)

⁶¹ Sacred Congregation for the Council, *Laurentana* (May 2, 1711), Fontes 3621; Galineau, 46.

⁶² Galinaeu, 36.

reside in them were generally to be buried in their own parish cemetery.⁶³ The Sacred Congregation of Bishops and Regulars applied the same rule to those who wore only the cord of the Franciscan habit should be buried in their proper parish cemetery.⁶⁴ Thus, although the faithful could choose to be buried outside of their parish cemetery, it would be by way of exception given the strong connection between one's parish and the parish of burial. Hence, the overall rule was that parishes were to have cemeteries, and churches belonging to other persons of institutes could have cemeteries with the permission of the bishop.⁶⁵

It seems also that, with the Protestant Reformation and a decline in overall discipline, other issues arose regarding the maintenance of Catholic identity and discipline in cemeteries. Among the central concerns was the question of whether non-Catholics could be buried in Catholic cemeteries; for it was increasingly the case that a family may have both Catholic and non-Catholic members. Initially, the response was to reiterate the historic rule that only Catholics could be buried in Catholic cemeteries.⁶⁶ In places where Catholics "live under the power of infidel rulers" the Holy Office permitted the passive tolerance of the practice of burying non-Catholics in Catholic cemeteries if there was no alternative.⁶⁷ Later, local councils such as the Council of Prague in 1860 and the Second Plenary Council of Baltimore in 1866 allowed the burial of non-Catholic relatives in a family vault in a Catholic cemetery.⁶⁸ However, in the discussion surrounding the First Vatican Council, commentators still deplored the

⁶³ Sacred Congregation for the Council, *Lauden* (April 14, 1685), Fontes n. 2885; Sacred Congregation for the Council, *Spoetana*, (April 19, 1692) ad 3, Fontes n. 2928.

⁶⁴ Sacred Congregation for Bishops and Regulars, *Sneigallien*, (22 Nov. 1580), Fontes n. 1374.

⁶⁵ Galineau, 34 -35.

⁶⁶ Sacred Congregation for the Council, *Uraltislavien*, (June 16, 1668) (quoted in Galinaeu, 55 – 57.)

⁶⁷ Sacred Congregation Holy Office, *Ad Ep. Scepusien* (Aug. 16, 1781), Fontes 843.

⁶⁸ Council of Prague Title II, cap. 13, n. 2 in *Mansi* XLVIII, 263; Second Council of Baltimore nn. 391-392 in *Concilii Plenarii Baltimorensis II: Acta et Decreta* ed. John Murphy (Baltimore: John Murphy, 1868) 203 (*hereafter Acta et Decreta Baltimorensis II*); Third Council of Baltimore nn. 317-319 in *Acta et Decreta Concilii Plenarii Baltimorensis Tertii* (*Hereafter Acta et Decreta Baltimorensis III*) (Baltimore: John Murphy and Company, 1886) ; cf, Galineau, 56 (discussing this issue.)

practice.⁶⁹ In addition, the old issues of maintaining Catholic discipline in churches and cemeteries were still present. Thus, for example, the Congregation of the Council had to make it clear that business transactions and the “noisy activity of secular trials” could not take place in churches or cemeteries.⁷⁰

With the increasing involvement of civil governments in cemeteries, the Church also had to deal with church state relations. In some cases, the issue was simply the regulation of cemeteries by the civil government, a practice that revived in the eighteenth century. But in some cases, the government forbade churches from owning cemeteries or insisted that all cemeteries be open to all people.⁷¹ The Church strongly condemned such legislation as violating the rights of the faithful. Thus, for example, Pope Pius IX in his allocutio *Numquam certe* strongly condemned laws that compelled Catholic cemeteries to bury the bodies of non-Catholics even when they had their own cemeteries.⁷² However, where such a situation arose, the Church tried at least to set aside a portion of general cemeteries as the Catholic portion. When that was not possible, the practice arose of blessing individual graves.

In the United States, that specific problem did not exist since civil law allowed private corporations to own cemeteries.⁷³ However, as with the old Roman law cities very often forbade cemeteries within cities, both for sanitary reasons and because they thought that the land could be better used for more “practical” purposes.⁷⁴ As a result, in many cases, the faithful had to bury their family members in cemeteries not associated with their specific parish. Nevertheless, it was considered important that Catholics be buried in Catholic cemeteries. Thus, the First

⁶⁹ Galinaeu, 57.

⁷⁰ Sacred Congregation for the Council, *Atrebaten*, (May 27, 1623), Fontes 2440.

⁷¹ Benedict Nguyen, *The Establishment and Administration of Catholic Cemeteries in the Diocese of Le Crosse* (Licentiate Thesis) (Washington, D.C.: Catholic University of America 2002) 5; O'Reilly, 9-10.

⁷² Pius IX, *Numquam certe*, AAS 4 (1868) 11.

⁷³ Stanislaus Woywood, *A Practical Commentary of the Code of Canon Law* (New York: Wagner, 1926) 2:32-32.

⁷⁴ Tanya Marsh, “Cemeteries as Land Use” in *Cemetery Law* 196-198; American Society of Planning Officials, Information Report No. 16 (1950) in *Cemetery Law* 200-201, 204.

Plenary Council of Baltimore mandated that Catholics be buried in Catholic cemeteries. The Second and Third Councils of Baltimore relaxed this mandate for situations where there was another place of burial for the family of a Catholic, but the strong preference was still for burial in Catholic cemeteries.⁷⁵

F. Summary of Themes from the History of Governance in Catholic Cemeteries

Although the situations varied over time, clear themes about the importance of Catholic cemeteries and their governance naturally arise from this brief historical overview. First, the Catholic Church considered it important that Catholics have their own cemeteries to unify the faithful in death as they were in life. The cemeteries were not simply places to remember the dead. They were meant to inspire prayers for the dead and the invocation of the prayers of the saints. Further, while there would be sorrow at the departure for a time of those one loved in life, it would be a hopeful, faith-filled sorrow, for the tombs of the faithful expressed the confidence in the Resurrection. They were in this way local representations of the sepulture of Christ, where the Resurrection took place.

Second, to maintain cemeteries and ensure that they were places of devotion, Church leadership has taken an interest in these cemeteries from the early centuries onward. Thus, while the early cemeteries were mostly owned by families, they were then increasingly run by parishes and sometimes by religious institutes, who were more able to maintain them through the years. To consecrate them as sacred land, bishops would bless the cemeteries; and to ensure

⁷⁵ The Archdiocese of Milwaukee outlined this history in its brief appealing the judgment of the Seventh Circuit Court of Appeals in *Listecki v. Official Committee of Unsecured Creditors*. See *Declaration of Archbishop Jerome Listecki*, Appendix E, *Petition for Writ of Certiorari in Listecki v. Official Committee of Unsecured Creditors* (2015) 94a, at <https://www.scotusblog.com/wp-content/uploads/2015/08/Listecki-Cert-Petition-and-Appendix.pdf>.

their continued dignity, the Church promulgated legislation for their maintenance. The parishes became the favored place for burial, although Catholics had the right to be buried elsewhere. Third, to allow all Catholics to be buried in a worthy manner, wealthy Christians who owned cemeteries in the early Church would make them available for those who could not afford them. In addition, finances in general have been a regular issue, with burial fees being a source of income. As a result, Church authorities had to navigate different interests on this point. Moreover, the Catholic identity of cemeteries was a continual concern. Finally, both in ancient Rome and again in the modern world, the Church had to deal with civil governments, both in their legitimate interests (such as health concerns) and in their oppressive opposition to Church owned cemeteries.

As will be described in the next chapter, the 1917 Code dealt with all of these issues. With the era of the Vatican Council II and the current code, the approach has changed, but the overall issues remain. Thus, the Church continues to maintain the importance of Catholic cemeteries. While the emphasis has shifted more to the diocesan level, there is still a focus on the particular Church. Bishops continue to bless cemeteries and thus make them sacred ground. As such the Church also must concern herself with the maintenance of them. With reference to finances, the Church no longer governs as strictly who receives the fees for burials, but the funding of cemeteries is still very much an issue. In particular, the concern in the modern era is more on making sure that the funds are present to maintain cemeteries, and ensuring that the poor have access to them. With reference to Catholic identity, the Church is no longer as strict as in the past about who can be buried in a Catholic cemetery. However, precisely because there are more non-Catholics buried in Catholic cemeteries, the issue of Catholic identity requires even more attention, both with reference to the monuments that are placed in Catholic cemeteries and

with reference to the activities in cemeteries. When persons other than dioceses and parishes own cemeteries, there is also the consideration of how to ensure the achievement of these significant goals. The next chapter will discuss recent developments in society and canon law on these fronts.

CHAPTER II

THE TWO CODES AND THEIR TREATMENT OF CEMETERIES: CONTINUITY AND DEVELOPMENT

In the midst of rapid changes in general practices surrounding cemeteries, the 1917 Code reiterated the Church's historic policies for them, with some developments. With further developments in ecclesial theology and practice, the 1983 Code modified the canonical rules regarding cemeteries, providing more flexibility and allowing more openness to non-Catholics and even the non-baptized to receive Catholic burial rites in some circumstances. However, for the historic policies regarding cemeteries still apply and the older legislation, although modified, should still inform particular law in this field.

This chapter will outline these developments in four parts. Part I will discuss the changes with regard to cemeteries that occurred from the late eighteenth through the twentieth centuries. Part II will outline the provisions of the 1917 Code governing cemeteries. Part III will then focus on some twentieth century ecclesial developments within the Catholic Church that affect cemeteries. And Part IV will outline the provisions of the 1983 Code governing cemeteries, with comments on the continuity and changes from the 1917 Code.

A. Modern Developments

Until the late eighteenth century, most cemeteries in Western Europe and then the Americas were owned by religious organizations, most commonly the Catholic Church.¹ As a result, ecclesial law usually governed them, for church and state were generally allied. However,

¹ Percival Jackson, "The Law of Burial in the United States" in *Cemetery Law* 179.

starting in the late eighteenth century, several developments occurred that would change the practice and understanding of cemeteries, changes that the Church has had to respond to.

In particular, through the Middle Ages and into the modern era, most cemeteries were run by parishes. Until the industrial area, burial in the local parish made sense because people and their families did not generally move long distances.² Some wealthy families also had their own cemeteries.³

Regarding finances, it was forbidden to charge people for cemetery plots themselves. This prohibition was based either on the view that selling sacred land was considered simony, or that it was simply unfitting to charge for a place of burial.⁴ However, it was historically allowed: (1) to accept freewill offerings for burial spaces; and (2) to charge a fee for the reservation of a specific space within a cemetery, rather than simply the right to a burial on the next available place. As a result, many or even most people would make offerings for their burial places.⁵ In addition, the parishes (or religious institutes) would collect a significant fee for the funeral and burial rites themselves. Those who could not pay these fees had the right to a burial in the parish cemetery, but without a special tomb. For there were not always markers for specific bodies, and in fact several bodies were often buried together.⁶ The income from such burials, and the extra donations and fees for specific land and sepultures, provided income for the future maintenance of the cemetery. Unfortunately, as described above, this income became a point of dispute between parishes and religious institutes.

² Tanya Marsh, *The Law of Human Remains* (Tucson, AZ: Lawyers & Judges Publishing Company, Inc. 2016) 5, 41; Jackson, 118-119.

³ Marsh, *The Law of Human Remains*, 60. Partially because of the availability of land, and partially because many colonial Americans lived far from any church, both in colonial America and until recently family cemeteries have been common among the middle class as well. Ibid.

⁴ Power, 155- 157 (describing this prohibition.) Power notes that the frequent repetition of the prohibition indicates that it was likely often being ignored.

⁵ Power 157-158; Tanya Marsh, "Cemeteries as A Land Use" in *Cemetery Law* 196-197; "Burial" in *New Standard Encyclopedia* ed. by Frank Vizetelly et al. (New York and London: Funk and Wagnalls Company, 1931) 419..

⁶ Tanya Marsh, "The Grave is Full of Instruction" in *Cemetery Law* 3; Marsh, *The Law of Human Remains* 45.

In the early modern era, as space became more of a consideration, the practice arose of burying people only for a time (e.g., 50 or 100 years) and then reburying the bones in an ossuary after that time.⁷ However, in the United States, people valued permanent burials; and, as a result, the European practice of planning for dis-internment and reinternment of the bones after a set number of years faded away and became considered unacceptable.⁸ In addition, with cities becoming more crowded, municipal governments increasingly went back to the old Roman practice of forbidding, or at least limiting, burials within cities, both for health reasons and for reasons of space.⁹ This prohibition prevented many urban churches from establishing cemeteries, or from burying any more people in their current ones. Some cities went further and ordered the removal of current bodies from cemeteries, to be reinterred outside of the city.¹⁰ Such prohibitions of new burials even led to a United States Supreme Court case. In that case, the Court held that, even if land had been designated as a cemetery, the prohibition of new burials there did not violate the 14th Amendment protection against the taking of property without due process.¹¹

⁷ Dana Horlick, "Grave Recycling" in *Cemetery Law* 208-209; Marsh, *The Law of Human Remains* 11; Sloane, 19.

⁸ David Sloane, *The Last Great Necessity: Cemeteries in American History* (Baltimore and London: The Johns Hopkins University Press, 1991) 3; Marsh, "The Grave is Full of Instruction" 8; Horlick, 208-210; Marsh, *The Law of Human Remains*, 11.

⁹ Tanya Marsh, "Cemeteries as A Land Use," in *Cemetery Law* 197-198; Sloane, *The Last Great Necessity* 3.

¹⁰ American Society of Planning Officials, "Cemeteries in the City Plan: Information Report No. 16 (July 1950) quoted in *Cemetery Law*, 201-202.

¹¹ *Laurel Hill Cemetery v. City and County of San Francisco*, 30 S. Ct. 301 (1910). The City and County of San Francisco eventually moved the bodies from the cemeteries in the city to a place outside the city. The Archdiocese of San Francisco at first opposed this plan, but later agreed to it. In fact, the University of San Francisco actually bought land that had formerly been a masonic cemetery. See William Proctor, "Location, Regulation and Removal of Cemeteries in the City and County of San Francisco" (1950 Report of the San Francisco Department of City Planning) quoted in *Cemetery Law* 331, 335-336. The change in views toward urban cemeteries is also illustrated by the case of the Brick Presbyterian Church in New York City. In 1766, the city sold a Presbyterian community land for a new church and cemetery. The Presbyterians built the Brick Presbyterian Church and cemetery. But then, in the 1820s New York City forbade any additional burials in that part of town. Then, in the 1850s the city widened the streets around the church and used eminent domain to buy part of the cemetery, which necessitated the reburial of some of the remains outside of the city. Thus, in less than a century, the New York government went from welcoming new cemeteries to limiting them to forcing even current cemeteries to relocate. Marsh, *The Law of Human Remains*, 6-7.

Another development was the increasing involvement of the government in owning cemeteries. By the late eighteenth century, civil communities began establishing their own cemeteries in a more rural setting away from the crowded cities.¹² The establishment of the famous Mount Auburn Cemetery outside of Cambridge, Massachusetts in 1832 became the inspiration for many other communities to establish their own rural cemeteries for the populace as a whole.¹³ Likewise, in Europe, the establishment of the Pere Lachaise cemetery by the French government outside of Paris was an inspiration for other government projects to establish civil cemeteries that would also be considered garden-like parks.¹⁴ Starting with the Civil War, the desire to honor the war dead likewise led to military and battlefield cemeteries in the United States, a practice that would spread elsewhere.¹⁵ As stated above, in some countries, they even began forbidding specifically religious cemeteries, or at least requiring religious cemeteries to provide burials for the general public. In the United States, private companies also began establishing their own cemeteries and running them as for-profit businesses.¹⁶

This shift from religious ownership to governmental and commercial ownership, as well as the general increase in regulation of commerce, led to further detailed government legislation regarding cemeteries. Likewise, without the guidance of church law, and with less government deference to churches, secular courts increasingly dealt with disputes between cemetery owners and the families of those buried in them, even when the cemeteries were owned by churches.

¹² Jackson, 179-180. The practice had become common in some parts of colonial America, where there were often communities before there were churches to bury them in. Marsh, "Cemeteries as A Land Use" 196-197.

¹³ Meg Green, *Rest in Peace: A History of American Cemeteries* (Minneapolis: Twenty-First Century Books, 2008) 32-36; C. Allen Shafer, "Family, Community and Churchyard Burials in America, in *Cemetery Law* 250; Sloane 44-46, 52-53.

¹⁴ Sloane 49-51.

¹⁵ Marsh, *The Law of Human Remains* 20-24; Sloane, 113-115.

¹⁶ Jackson, 179-180. Such cemeteries run by for-profit corporations were often called "lawn cemeteries." Marsh, *The Law of Human Remains* 62. By contrast, the concept of private business operating cemeteries has not become common in Europe, except in Great Britain. Rather, cemeteries there are typically operated by either the government or religious organizations. David Sloane, *The Last Great Necessity* 3.

Thus, for example, in response to a dispute in the 1850s over the compensation owed by New York City for the taking of land that had been used by a Presbyterian Church for burial vault, the Surrogate's Court in New York commissioned a lawyer Samuel Ruggles to write report about how the civilly legal principles were applicable to burial plots. His report, subsequently called *The Ruggles Report* said that, because religious law does not generally apply in the United States, civil law must govern cemeteries, although it may well draw upon older ecclesial law.¹⁷ Although not binding outside of that case, *The Ruggles Report* had a great deal of influence in American law and led to more regulation of cemeteries by states. As a result, in the United States, states began enacting "Cemetery Acts" to govern for-profit cemeteries, with non-profit cemeteries often being exempt.¹⁸

There was also a change in the way cemeteries were funded. Until the mid-19th century, civil communities and churches did obtain money for cemetery plots, with the more elaborate cemetery plots costing more. However, when the government or the church operated a cemetery, the sale of cemetery plots was considered as a source of funding for the cemetery, rather than for profit. Churches and governments thought of themselves as providing for a need, rather than selling a service.¹⁹ Then, with for-profit cemeteries becoming much more common, there was increasing concern about the commercialization of death. This process continued in American as for-profit cemeteries became more common throughout the 19th and 20th centuries.²⁰ In the case of these for-profit cemeteries, it became understood that there should be a cemetery fund to provide income for the future maintenance of cemeteries. In addition, cemeteries often or even

¹⁷ Marsh, *The Law of Human Remains*, 7-8.

¹⁸ Ibid., 62; Sloane, 193-197

¹⁹ Sloane, 128-129.

²⁰ See Sloane, 130-139 for a description of the beginnings of this process.

usually received continual income from an annual maintenance fee and from providing special services such as regular cleaning of graves and placement of flowers around them.²¹

For Catholic parishes and dioceses, this issue of charging for cemetery plots raised the old questions. In the years leading up to the 1917 Code, some canonists argued that it was permissible to expect the family of the deceased to make an offering to defray the cost of the cemetery land and its upkeep, with the understanding that no such offering was expected from the poor. The argument was that this fee was not for the sale of sacred land since the parish or other moral person would still own the land. Rather, the money received for a cemetery plot was only considered to be a fee charged for the use of the cemetery plot; the Church would still own the land. Because there was no sale of sacred things, it was not simony.²² As a result of this reasoning, it became more acceptable for Catholic parishes to charge for cemetery plots on a more regular basis, rather than relying only on freewill offerings and funeral and burial fees.²³ However, the concern about the appearance of simony continued. Thus, for example, the Second Council of Baltimore required that, if the sale of cemetery plots produced more revenue than was needed for the purchase and maintenance of the cemetery, the excess should be used for religious and charitable purposes. The Council also strongly forbade church officials from personally receiving any money from cemeteries without the ordinary's permission, and called for severe penalties for violations of this rule.²⁴

There was also another change in the provision of services surrounding a burial. Historically, either the church or the family or neighbors were responsible for preparing the body for burial. However, during the late 19th and 20th centuries, these services (e.g., making the

²¹ Sloan, 203-204.

²² Charles Augustine, *A Commentary on the New Code of Canon Law* Vol. VI (St. Louis and London: B. Herder Book Co., 1931) 110-111. Power, 159-161.

²³ Power, 167.

²⁴ Second Council of Baltimore n. 393 in *Acta et Decreta Baltimorensis II*, 204.

coffins, performing the burial and the increasing practice of embalming) shifted from being performed by churches or families to the realm of government appointed agents and then private corporations, who charged substantial fees for them.²⁵ In addition, people began to plan for funeral expenses through pre-paid plans, funeral insurance, or mutual benefit societies. With such financial issues came government regulation of these contracts, including requirements that most of the payments for these arrangements be placed in a trust fund to satisfy the obligations.²⁶ When a person died and his family or estate could not pay for a burial and a cemetery plot, the state generally took on the responsibility for the burial; indigent people were thus often buried in “potter’s fields” or common graves.²⁷ However, civic associations in the United States did try to offer more fitting burials to the indigent. And the Catholic Church in particular was known for its willingness to provide free decent burials and cemetery plots for the poor.²⁸

This commercialization of burials started in the mid-18th century but became much more prominent starting in the mid-19th to early 20th centuries.²⁹ Alongside of this commercialization came the commercial funeral home industry, which then led to additional government oversight.³⁰ Even public cemeteries were managed in a more business-like fashion.³¹ This situation did make burials more professional, but could also make them less personal and

²⁵ Marsh, “The Grave is Full of Instruction” in *Cemetery Law*, 3; Tyler Gardner, “Grave New World,” in *Cemetery Law*,. 219; Sloane, 119-120.

²⁶ Marsh, *The Law of Human Remains* 74-75. For its part, the United States Federal Trade Commission promulgated The Funeral Rule in 1984 (revised in 1994) to prohibit unfair or deceptive practices by those who provide funeral services of any type such as requiring families to purchase services other than the basic ones or present services such as embalming as required by law when they are not. Marsh, *The Law of Human Remains*, 24-27.

²⁷ Sloane, 84, 200; Green, 24-25. This obligation of the state is a sort of continuation of the older parochial obligation to bury indigent parishioners. Ibid. 79-80. In London, the Ecclesiastical Court distinguished between the right to a burial in the local parish, and the availability of a coffin that would preserve the body. The court held that the indigent did have the right to burial, but not to a coffin. Samuel Ruggles, “An Examination of the Law of Burial in a report to the Supreme Court of New York” quoted in *Cemetery Law*, 151, 162-163. In addition, as with ecclesial law, it was often understood that criminals and those who had committed suicide were not to be buried in regular cemeteries. Green, 24-25.

²⁸ Sloane, 84.

²⁹ Marsh, *The Law of Human Remains* 57-58.

³⁰ Ibid., 67-74; Sloane, 234-235.

³¹ Green, 45-47.

devotional, as well as more expensive. With regard to both cemeteries and funeral homes, there was an increasing concern that they were becoming too cold and sometimes even manipulative in efforts to make profits.³² Worse yet, precisely because people who had recently lost loved ones were often very emotional and desirous of showing their affection, reports circulated about unscrupulous funeral homes and cemeteries playing on people's emotions and persuading them to spend excessive amounts of money.³³ Two twentieth century novels, *Abide with Me* by the socialist writer and commentator Cedric Belfrage and *The Loved Ones* by the Catholic writer Evelyn Waugh, portrayed this concern in fiction literature that featured funeral homes and cemeteries that were run by crass managers who promoted vain and superficial attitudes toward the dead.³⁴ There was thus a desire for professional management of cemeteries, but also a desire to maintain the old sense of burials as a sacred calling, not merely a business service like any other.

Connected to these changes in practice was a shift in the views toward cemeteries. While the Catholic Church maintained her traditional views of reverencing and praying for the dead, in the nineteenth century societies in the United States began viewing cemeteries as beautiful parks that would give people a sense of peace in the face of death and a sense of civic pride in union with those who had gone before.³⁵ More optimistic views about salvation led to a desire to make cemeteries more cheerful places that gave people a sense of peace.³⁶ These goals were themselves good and consistent with Christian theology. However, there could be more of a focus on cemeteries as primarily meant for the earthly goal of inspiring good feelings, rather than

³² Sloane, 6, 175, 193-197.

³³ Green, 75-76; Sloane, 208-212.

³⁴ Cedric Belfrage, *Abide With Me* ((New York: William Sloane Associates, 1948); Evelyn Waugh, *The Loved One* (New York: Little, Brown and Company, 1948). See Fr. William Casey, "God's Acre without God?" in *God's Acre*, 3-4 for a description of these novels.

³⁵ Sloane, 63-65.

³⁶ Sloane, 72-73.

the religious goal of praying for the dead, asking for their intercession, and looking forward to the Resurrection for the dead.³⁷ For example, Reverend William Casey, the first president of the National Cemetery Conference of the United States, was not as negative about funeral homes and cemeteries in general as some of the critics. In fact he complemented the American Cemetery Association for its assistance in fostering practical improvements with regard to the management of cemeteries.³⁸ But he expressed his concerns to that association that American cemeteries, while among the best looking and maintained in the world, distract people from the meaning of death and from focusing on spiritual realities. As he put it,

Yes, we brag that in this country are the most beautiful cemeteries in the world. I wonder what is the purpose of all this? . . . We have the best of intentions, but it can be summed up briefly. It seems to be to hide the reality of death. It is to drug the sense of the mourners into viewing death as something else.³⁹

He then argued that, if people are confronted with the reality of death, they would live their lives better. He then asked even for-profit cemetery owners, “Might not all of us be able to profit from considering our cemeteries and burials in them in the light of the supernatural?”⁴⁰

In addition, there was the practical concern for maintaining cemeteries. For with religious communities and towns rising and falling, some cemeteries were neglected, which was considered both morally and aesthetically unacceptable.⁴¹ Furthermore, there was concern with violations of cemeteries by vagrants who wished to damage them, or use them for dark purposes.⁴² As a result, most states in the United States have specific laws making it a crime to desecrate graves; and such desecration included not only vandalism, but also using cemeteries

³⁷ Daniel Gibson, “Changing Perspectives on the Dead” in *Cemetery Law*, 172-174. Gibson argues that most people in American now think of cemeteries as for the living, not the dead or a communion with them.

³⁸ Casey, 68-70.

³⁹ *Ibid.*, 72-73.

⁴⁰ *Ibid.*, 73.

⁴¹ Green, 16-17; 40-41; 87-88.

⁴² Green, 37-38.

for such purposes as grazing, mining or drilling for oil.⁴³ Other legislation fostering such goals as giving the government the role of acquiring abandoned cemeteries, requiring commercial cemeteries to maintain cemetery funds for the future upkeep of their grounds, and mandating the overall upkeep of cemeteries.⁴⁴ Cemetery owners and managers also imposed more vigilance over their cemeteries to prevent such desecration.⁴⁵

Supreme Court Justice Joseph Story addressed both of these concerns about the maintenance of cemeteries in his 1831 dedication speech for the Mount Auburn Cemetery, saying:

It is painful to reflect, that the Cemeteries in our cities, crowded on all sides by the overhanging habitations of the living, are walled in only to preserve them from violation. And that in our country towns they are left in a sad, neglected state, exposed to every sort of intrusion, with scarcely a tree to shelter their barrenness, or shrub to spread a grateful shade over a new-made hillock. These things were not always so among Christians. They are not worthy of us. They are now worthy of Christianity in our day.⁴⁶

In the United States, the Second and Third Councils of Baltimore required pastors of souls to keep Catholic cemeteries in a good condition. The Second Council of Baltimore also specifically required Catholic cemeteries to set aside a portion of the income from the sale of plots toward the future upkeep of cemeteries.⁴⁷

Another significant issue was the increased use of cremation, rather than full burial. In the past, as reverent burials were a sign of faith in the Resurrection, cremation had been considered a rejection of this belief. However, increasingly, cremation was promoted because it

⁴³ Marsh, *The Law of Human Remains* 82-83. Apparently, the use of cemeteries for the grazing of livestock was a real issue when the cemeteries were located in prime agricultural land. Meg Green, *Rest In Peace*, 23.

⁴⁴ Tanya Marsh, "The Regulation of Cemeteries" in *Cemetery Law*, 295, 297-298; Brett Becker "Danger Doesn't End at the Grave" in *Cemetery Law*, 302-309.

⁴⁵ Green, 38.

⁴⁶ Justice Joseph Story, "Address at the Consecration at Mount Auburn" in *Cemetery Law* 128, 131-132. He also did point out that cemeteries are important to honor the dead, give solace to the living and remind us of our own mortality, goals that are similar to those of the Catholic Church.

⁴⁷ Second Council of Baltimore n. 393 in *Acta et Decreta Baltimorensis II* 203; Third Council of Baltimore n. 319 in *Acta et Decreta Baltimorensis*, 183.

was simpler, less costly and used a smaller amount of land, which was an increasingly concern in more crowded areas.⁴⁸ The Catholic Church recognized that cremation was sometimes done for innocent reasons, but continued forbidding it due to historic associations with a rejection of the faith.⁴⁹

In order both to assist Catholic cemeteries in the midst of these changes and to promote the Catholic vision of cemeteries, 25 American dioceses join together in 1949 to form the National Catholic Cemetery Conference of the United States.⁵⁰ Its first director was Fr. William Casey, who had become well known for his management of Catholic cemeteries.⁵¹ As the National Catholic Cemetery Conference was being formed, Fr. Casey gave a talk entitled “God’s Acre” at the annual convention of the American Cemetery Association in 1948, in which he argued that even corporately run cemeteries should be seen as more than a mere business. He argued “that the burial of the dead should be recognized in any cemetery as a sacred work, that it should be in any cemetery a religious work, which it is not just akin to but closely identified with the exercise of religious worship, no matter what your religion may be.”⁵²

His call for all cemeteries, even secular ones, to be considered sacred exemplifies a final development that provided a great opportunity, but also a need for careful consideration. In particular, there was an increasing interaction between the Catholic Church and the secular realm in many ways, including with regard to cemeteries. Thus, for example, the more common situation in which Catholics had non-Catholic spouses or other relatives that they wished to be buried near brought up with increased frequency the issue of how to preserve family unity in

⁴⁸ Marsh, “The Grave is Full of Instruction” in *Cemetery Law*, 4. In the United States, approximately 42 percent of bodies are now cremated. Marsh, *The Law of Human Remains*, 59. Sloane outlines both the beginnings and development of this trend in America. Sloan, 140-154, 227-230.

⁴⁹ Augustine, *A Commentary on the Code of Canon Law* 471.

⁵⁰ Catholic Cemetery Conference, “History” at <https://catholiccemeteryconference.org/about/history>.

⁵¹ *God’s Acre*, xxvii-xxviii.

⁵² Casey, “God’s Acre without God?,” in *God’s Acre*, 14-15.

burials, when non-Catholics were not allowed in Catholic cemeteries, even as Catholics were strongly encouraged to use them.⁵³ On the other hand, as noted above, the mixture of Catholic and non-Catholics within the same families led to the passive toleration in some cases of the burial in Catholic cemeteries of non-Catholics who were related to Catholics.⁵⁴ As Reverend Casey's ministry made clear, the Catholic Church wishes to have a positive impact on all cemeteries, regardless of background. The increased interaction between Catholics and the world could lead to more dialogue and cooperation, but raised the issue of how to maintain Catholic identity at the same time.

B. The Provisions of the 1917 Code

In the midst of these changes, the 1917 Code reiterated the time-honored policies of the Church, along with a recognition of new realities. That code treated cemeteries and funeral rites alongside of each other in the same title. In particular, the second part of Book III "On Things" was "On Sacred Places and Times." And within that part, Title 12 was "On Ecclesial Burial." That title in turn was divided into three chapters: (1) on cemeteries, canons 1205 - 1214; (2) on the transfer of the corpse to the church, the funeral and the burial, canons 1215-1238; and (3) on those to whom ecclesial burial is to be granted or denied, canons 1240-1242.⁵⁵ Thus, Catholic cemeteries and Catholic funeral rites were inherently tied together, with the former a preparation for burial in the latter. This connection reflected a strong preference that the funeral rites end

⁵³ O'Reilly, 19-20. That was one reason for the relaxation, mentioned above, of the First Council of Baltimore's requirement that Catholics be buried in Catholic cemeteries.

⁵⁴ Gallineau, 55-56.

⁵⁵ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (Rome: Typis Polyglottis Vaticanis 1917) canons 1205 – 1242. English translation from Edward Peters, *The 1917 Pio-Benedictine Code of Canon Law In English Translation* (San Francisco: Ignatius Press, 2001) (Subsequent translations will be from this source.)

with a burial in a specifically Catholic cemetery. Another result was also the historic denial of burial in a Catholic cemetery to those who could not have a Catholic funeral; however, as noted below, there were slight accommodations on the latter point, in addition to the passive tolerance that was already occurring in many places.

Chapter 1 began with canon 1205 §1, which stated that Catholic were to be buried in cemeteries blessed by a bishop. Following upon this point, canon 1206 §1 then strongly affirmed the Catholic Church's right to own cemeteries, in opposition to governments who forbade it.⁵⁶ Paragraphs 2 and 3 then dealt with situations in which this right is violated when governments forbade cemeteries owned by the Catholic Church.⁵⁷ If the majority of people buried in a civil cemetery were Catholic, the bishop would bless the whole cemetery. If that was not the situation, the Catholic Church should try to acquire a portion of a civil cemetery reserved for Catholics, which would be blessed for their use. If even that alternative was not available, the individual graves of Catholics were to be blessed. In addition, canon 1208 §3 provided that the ordinary can allow "moral persons" (i.e., ecclesiastically established juridic persons) and families "to have a special place for burial located outside of the common cemetery and blessed in the manner of cemeteries." The distinction between cemeteries and "a special place for burial" indicated that such places were not considered cemeteries in the strict sense, but were still established by the episcopal blessing as sacred land. Because it was sacred land, Fr. O'Reilly

⁵⁶ As stated above, this requirement that there be only common cemeteries was a problem in many places, especially in Europe, and even in Italy. Augustine, 106-107. In the United States, by contrast, the Catholic Church could own her own cemeteries. Augustine, 108; Woywood, 34-35.

⁵⁷ Another concern was civil legislation in some countries that allowed churches to own cemeteries, but required that such cemeteries also bury people who were not of that faith. Augustine, 8-9. In *Numquam certe*, described above, Pope Pius IX protested the requirement that they be open to burials of all people. (The specific issue at hand was recent legislation in Austria.) That requirement would effectively prevent, or at least severely hamper, the Catholic Church from owning cemeteries. For a Catholic cemetery was considered violated if a non-baptized person or an excommunicated person were buried in it. 1917 Code § 1172 §1, 4°. The burial of non-Catholic Christians was forbidden, although sometimes tolerated; and it would not cause such a violation. Augustine, 27-28.

concluded that such other burial places could only be alienated with the consent of the ordinary, or major superior of exempt religious.⁵⁸

In addition, the code apparently recognized the right of civil authorities to promulgate reasonable regulations even with regard to Catholic cemeteries. For canon 1206 §1 only referred to the Catholic Church's right to possess cemeteries. Canon 1495 likewise referred to the Church's right to acquire, own, and administer her own property; but that canon included the phrase "freely and independently of any civil powers."⁵⁹ However, that phrase "freely and independently of any civil powers" was not in canon 1206. Thus there was apparently the recognition that reasonable civil regulations regarding such things as location, sanitation and upkeep were permissible.⁶⁰

The 1917 Code also reaffirmed the connection between cemeteries and parishes. Thus, canon 1208 that parishes should have their own cemetery, unless the ordinary has allowed several parishes to have a cemetery together. The exception for multi-parish cemeteries reflected a recognition that it was no longer practicle to have a cemetery at every church, especially in cities.⁶¹ The parish cemetery was still presumptively the cemetery in which a member of the faithful was to be buried. However, the code affirmed the right of the faithful to elect the cemetery of their burial, unless prohibited by law (e.g., in the case of religious.) Resolving a disputed point, it added that wives and pubescent children could select their own burial places independently of the power of their husbands and parents.⁶² Canon 1225 provided that, if

⁵⁸ O'Reilly, 38. Fr. O'Reilly refers to canon 1209 §1 as the basis for this conclusion. However, strictly speaking that paragraph only required the ordinary or Major Superior's permission for the alienation of plots set aside for individuals in Catholic cemeteries, not for the alienation of cemeteries or other burial places owned by moral persons or families. However, it would seem that the same principle would apply.

⁵⁹ 1917 Code c. 1495 §1: *Ecclesia catholica et Apostolica Sedes nativum ius habent libere et independenter a civili potestate acquirendi, retinendi et administrandi bona temporalia ad fines sibi proprios prosequendos.*

⁶⁰ Augustine, 113-114; Nguyen, 11; O'Reilly, 9-10.

⁶¹ 1917 Code c. 1223§1; cf. O'Reilly, 35-36; Woywood, 36.

⁶² 1917 Code c. 1223 §2; cf. Woywood, 44.

another cemetery was validly selected, it must be a parochial church, a church of regulars, or a church that had the right to bury this person, or was granted the right of funerals generally.

Regarding special burial places, canon 1209 §3 also poignantly added that there should be a separate place for infants.⁶³ Paragraph 2 said that clergy should if possible have a separate place for burials. According to paragraph 3, with the written permission of the ordinary (or the superior for a cemetery owned by religious), the faithful could acquire a separate burial place; and they could, with the same permission, alienate the property.

The code also dealt with financial issues. Thus, in order to keep funeral and burial fees consistent and fair, canons 1234 and 1235 provided that no one could charge more for a funeral or burial service than what is established by the diocese.⁶⁴ This fee was to be fixed by the local ordinary, with the advice of the Cathedral chapter, and possibly pastors and the vicars foraine. There could be a list of fees for different classes of funerals. However, they had to be set with moderation, avoid scandal and respect local customs and circumstances. That fee would include a “parochial portion,” that is from the funeral and burial fees (not the cost of the cemetery plot) that is owed to the parish. Canons 1236-1237 then established a system of giving that “parochial portion” to a person’s parish of domicile when he was buried elsewhere unless he could not conveniently be brought to his own parish for a burial. This provision reflected the fact that burials were still a significant source of income in many places, as they had been during the Middle Ages, when this issue had been a subject of legislation and privileges granted to some

⁶³ This place, however, would only be for baptized infants. O’Reilly, 39. For unbaptized infants, the place for those denied an ecclesiastical funeral would presumably have a place for them. Ibid. 39-40.

⁶⁴ Cf. Woywood, 51-52. Canon 1234 referred only to funeral fees. However, canon 1235 implies that such fees also include the fee for a burials and memorial Masses, for it says that no one can charge more than the standard fee for a funeral or a burial. Paragraph 2 of that canon likewise says that the poor are free of the obligation for paying for both funerals and burials. These limitations apparently did not directly apply to the amount charged for a cemetery plot, but only for the burial services.

religious orders.⁶⁵ Furthermore, canon 1235 §2 provided that the poor should receive decent funeral services without payment.

The code also addressed the maintenance and Catholic identity of the cemeteries in several provisions. Thus, canon 1210 said that cemeteries should be enclosed and safely locked, evidently responding to the threat of vandalism or desecration. Generally, it was expected that there would be a groundkeeper (often called the sexton) or similar employee, who would be entrusted with guarding and maintaining the cemetery.⁶⁶ Canon 1207 also applied to cemeteries the principles of canons 1172-1177 which referred to what happens when a church is violated and thus needs to be reconciled before divine worship can take place in it.⁶⁷ It was also generally understood that the duty to preserve the safety of cemeteries implied a duty to make provisions for its future upkeep.⁶⁸ Canon 1211 added that the ordinaries, pastors and superiors should ensure that epitaphs, funeral praises, monuments and the like be consistent with the Catholic faith. In addition, the canon 1214 forbade the exhumation of a person who had been given ecclesiastical burial without the Ordinary's permission, which should only be given if each corpse can be discerned from the others. The presumption was that there may be reasons to move a cemetery or a body (e.g. to move the body closer to the family, or to move the body to a more local cemetery after burial in a battlefield cemetery) but that the ordinary should keep vigilance over these situations.⁶⁹

⁶⁵ Cf. Woywood, 53-54.

⁶⁶ O'Reilly, 41.

⁶⁷ See O'Reilly, 21-32 and Power, 169-199 for descriptions of how a cemetery could be violated, the consequences, and the manner of reconciling the cemetery afterwards.

⁶⁸ Woywood, 37. Thus, for example, the Second and Council of Baltimore expressly required that a portion of the proceeds from the sale of cemetery plots be set aside for the upkeep of the cemetery. Second Council of Baltimore n. 393, in *Acta et Decreta Baltimorensis II*, 204. The Third Council of Baltimore made it clear that the pastors are responsible for ensuring the upkeep of a parochial cemetery. Third Council of Baltimore n. 319, in *Acta et Decreta Baltimorensis III*, 183.

⁶⁹ Woywood, 38, 41.

On a similar note, continuing the insistence that Catholic cemeteries reflect the unity of the Church, canon 1239 §1 maintained the historic prohibitions against burial in a Catholic cemetery to anyone who died without baptism, except catechumens. Canon 1240 then continued on with the prohibition against the burial in a Catholic cemetery of “notorious apostates from the Christian faith, or those who notoriously gave their name to heretical sects or schismatic or masonic sects, or other societies of that sort.”⁷⁰ Unless there were signs of repentance, the canon also denied funeral rites and burial in a Catholic cemetery to people who had been excommunicated, those under interdict, people who died by suicide or duel, people who had chosen to be cremated, and “public and manifest sinners” generally.⁷¹ In fact, the burial of “infidels” or excommunicates would constitute a violation of a cemetery, and thus require a re-consecration before its further use.⁷² The burial of non-Catholic Christians in Catholic cemeteries was forbidden, for they were considered to have given their name to heretical or schismatic sects; however, such burials were sometimes tolerated, and would not be considered a violation of the cemetery.⁷³ In addition, paragraph 2 did provide that, in case of doubt, a burial was to be given. And the reference to “notorious sinners” in canon 1240 indicated that any misdeeds had to be public in order for them to result in the denial of an ecclesiastical burial.⁷⁴

There were, however, two slight accommodations on the point of the denial of burials in Catholic cemeteries to non-Catholics and others who committed various offenses. Canon 1212 said that, beside the blessed cemetery, there should be another place, if possible, for the burial of those who were denied an ecclesial burial. According to Fr. O'Reilly, there would generally be

⁷⁰ 1917 Code c. 1240 §1, 1°: *Ecclesiastica sepultura privantur, nisi ante mortem aliqua dederint poenitentiae signa: 1° Notorii apostatae a christiana fide, aut sectae haereticae vel schismaticae aut sectae massonicae aliisve eiusdem generis societatibus notorie addicti.*

⁷¹ 1917 Code c. 1240 §1, 2-6°

⁷² 1917 Code c. 1171 §1, 4°; O'Reilly, 26-28.

⁷³ O'Reilly, 27-28. O'Reilly explains that, before the 1917 Code, there was an open question about whether the burial of a non-Catholic Christian constituted a violation of the cemetery.

⁷⁴ Woywood, 55-56.

three distinct places, for the unbaptized in general, for unbaptized infants, and for those who were considered delinquents.⁷⁵ And, as stated above, the bishop was to bless a civil cemetery if the majority of people buried there were Catholic. In that case, even non-Catholics could be buried in a blessed cemetery, and thus in sacred ground, even if it was not a Catholic cemetery.

The remainder of the canons in title 12 gave detailed instructions on the transfer of the corpse to the church, the funeral, the burial and the records to be kept. Thus, overall, the 1917 Code maintained the historic concerns regarding cemeteries, with some updating for the situations of the modern world. It affirmed the importance of Catholic cemeteries, and the right of ownership in the face of civil restraints, while recognizing some legitimate role of civil regulation. It emphasized the preference for burials in parish cemeteries, while affirming the right to choose a cemetery other than that of one's own parish. It called for local legislation for the purpose of fairness and consistency in fees for burials, and navigated the issue of dividing income between parishes when more than one parish was involved. It provided for the burial of indigents, and also gave special preference to infants. It referred to the duty to maintain and guard Catholic cemeteries and their Catholic identity. And it continued the general reservation of Catholic cemeteries solely to Catholics in good standing; but it recognized some accommodation to be made for others. Subsequent developments in Church theology would make changes in this last provision. But the other goals have mostly remained intact, with greater flexibility now given to local ordinaries.

⁷⁵ O'Reilly, 40. It is not clear whether there was a fourth place, for the baptized non-Catholics, or whether they would be buried with those who were unbaptized. Given that their baptism was considered doubtful, it may well be that they were simply buried with the unbaptized. Likewise, when a portion of a civil cemetery was set aside for Catholics, there could also be another portion set aside for those denied an ecclesial burial.

C. Ecclesial Developments from the 1917 Code to the 1983 Code

Among the many developments in theology and practice that occurred between the two codes, three changes particularly affect the management of Catholic cemeteries. First, particularly in light of the Second Vatican Council, the Church has taken up a more ecumenical and inter-religious focus, recognizing the connection between non-Catholics and the Church. Second, there has been an increasing hope that infants who die before baptism may well still be credited with the merit of baptism. Third, also in light of the Second Vatican Council, the Church has emphasized the role of the diocesan bishop in governing his diocese with immediate, proper, and ordinary power. This section will consider each of these developments.

Even before the Second Vatican Council, there was an increasing respect between Catholics and non-Catholics.⁷⁶ The Second Vatican Council took up this ecumenical focus, and the desire for interfaith dialogue and cooperation, particularly in the dogmatic constitution *Lumen gentium*, the decree *Unitatis redintegratio* and the declaration *Nostrae aetate*. *Lumen gentium* affirmed the centrality of the Catholic Church in the salvation of all people.⁷⁷ However, in section 15 it also said that the Church “recognizes that in many ways she is linked to those who, being baptized, are honored with the name of Christian, though they do not profess the faith in its entirety or do not preserve unity of communion with the successor of St. Peter.” Likewise, it recognized that even non-Christians “are related in various ways to the people of God.” That constitution thus affirmed that there is a middle ground between those who are fully members of

⁷⁶ For example, Louis de Worhl ended his 1961 ecclesial history *Founded on A Rock*, “Ancient enmities – like that between France and Germany – are vanishing. The leaders of great Christian denominations are writing and talking about each other with respect and often with warmth. Only small, bigoted sects, led by bitter little men still screech parrot-fashion, the old reproaches and accusations. . . . Unity will come in God’s own time.” Louis de Worhl, *Founded Upon Rock* (Westport, Connecticut: Greenwood Press, 1961) 234.

⁷⁷ Second Vatican Council, Dogmatic constitution *Lumen gentium* 14, November 21, 1964: AAS 57 (1965) 18-19.

the Church and others who have a partial relationship to her. Thus, the old notion that only those joined to the Catholic Church in life should be joined to her in burials required a more nuanced approach.

Promulgated on the same day as *Lumen gentium*, *Unitatis redintegratio*, described among many other things a “spiritual ecumenism” through which Catholics could, with discernment, join in common prayers with non-Catholic Christians. It said that this spiritual ecumenism should combine two principles: (1) the witness to the unity of the Church; and (2) the sharing of the means of grace. It noted that the witness to the unity of the Church does prevent some forms of common worship; but it also said that the desire to share the means of grace sometimes commends it.⁷⁸ While not directly addressing the issue of cemeteries, the implication is that we can join with other Christians in common prayers and devotions surrounding death. And such common prayers and devotions can be a means of unity. However, the Church should still be careful that her teachings are proclaimed in that context.

Promulgated the next year, *Nostrae aetate*, did not describe the same type of spiritual union with non-Christian religions, but it did focus on the positive values in them. Thus, it recognized that people of other religions ask many of the same questions as we do, including “What are death, judgement and retribution after death? What, finally is that ultimate inexpressible mystery which encompasses our existence: whence do we come, and where are we going?”⁷⁹ And the declaration likewise called for “dialogue and collaboration with the followers of other religions, carried out with prudence and love in witness to the Christian faith.” Through such efforts the faithful can “recognize, preserve and promote the good things, spiritual and

⁷⁸ Second Vatican Council, Decree *Unitatis redintegratio* 8, November 21, 1964: AAS 57 (1965) 98.

⁷⁹ Second Vatican Council, Declaration *Nostrae aetate* 1, October 28, 1965: AAS 58 (1966) 740.

moral, as well as the socio-cultural values found among them.”⁸⁰ Once again there was no direct reference to cemeteries. However, here too, there is the implication that the Church can join with non-Christians in prayers and devotion surrounding death; but such common efforts should be prudent and still be a witness to our faith.

Regarding the connection to the Church of unbaptized infants, the 1917 Code did not make any special provisions. Before that code, it was generally held that an unbaptized infant could not be buried in a Catholic cemetery, even if the parents intended to baptize him, unless the mother died with the infant in her womb. They would instead be buried in unconsecrated ground that could be near the cemetery.⁸¹ That practice in turn reflected the belief that unbaptized infants were in some state, often called limbo, between heaven and hell, and the related belief that they could neither benefit from our prayers nor intercede for us. The 1917 Code did not make any changes in that practice, although the provision for a separate burial site next to Catholic cemeteries for those who could not have a Catholic funeral could have been in part an attempt to deal with these situations. However, the Church has since proposed at least a strong hope of salvation for infants who die without baptism, as reflected in both the Catechism of the Catholic Church and the International Theological Commissions statement on this issue.⁸² Even before the Catechism and that statement were published, canon 1183 §1 and the revised Order of Christian funerals provided that, with the Ordinary’s permission, funeral rites could be celebrated for children whose parents intended to baptize them but who died before they could

⁸⁰ Ibid.

⁸¹ Schmaltzgueber, *Jus Ecclesiasticum* Book III, title XVIII ch. 6 n. 71; Power, 51-52 (discussing some accommodations if the infant and mother died together in childbirth.) It should be noted that, before the 1917 Code, there was a dispute about whether the burial of unbaptized infants of Catholic parents would cause a violation of the cemetery. O’Reilly, 27. That dispute may indicate that unbaptized infants were in fact sometimes buried in Catholic cemeteries. The 1917 Code, however, made no special provision for them.

⁸² Catechism of the Catholic Church 1261; International Theological Commission, *The Hope of Salvation for Infants Who Die without Being Baptized* (approved by the Supreme Pontiff *in forma specifica* January 19, 2007) at https://www.vatican.va/roman_curia/congregations/cfaith/eti_documents/rc_con_cfaith_doc_20070419_un-baptised-infants_en.html.

do so.⁸³ That provision of Catholic funerals for unbaptized infants would in turn imply that they could be buried in Catholic cemeteries.

Regarding the role of dioceses and bishops, the Second Vatican Council gave greater emphasis to the role of the diocesan bishop in governing his own diocese, and in the unique goodness of each particular church, while also emphasizing the unity of the whole Church. Thus, in section 23 *Lumen gentium*, the Council addressed both the unity and diversity of the Church. It began with a focus on the collegial union of the bishops with the Roman Pontiff. It then also described individual bishops as “the principle and foundation of unity in their particular churches, fashioned after the model of the Universal Church, in and from which churches come into being the one and only Catholic Church” The constitution then emphasized the role of bishops in guiding their particular churches, saying, that “The individual bishops, who are placed in charge of particular churches, exercise their own pastoral government over the portion of the People of God committed to their care;” at the same time they should be “solicitous for the whole Church.”⁸⁴ Along similar lines, the *Christus dominus*, the Decree on the Pastoral Office of Bishops in the Church, the Council made clear that “Individual bishops who have been entrusted with the care of a particular Church – under the authority of the supreme pontiff – feed their sheep in the name of the Lord as their own, ordinary and immediate pastors.”⁸⁵ As a result of this focus on the role of the diocesan bishop in governing his own diocese, the Commission for the Revision of the Code included as fifth in its overall principles for this revision the increased focus on subsidiarity. In this context, it said that bishops should be able to promulgate more legislation for themselves according to the needs of their own dioceses, with the overall

⁸³ CIC c. 1183 §2; Introduction, Order of Christian Funerals 18 in *Order of Christian Funerals: Approved for Use in the Diocese of the United States of America by the National Conference of Catholic Bishops and Confirmed by the Apostolic See* (Collegeville, MN: The Liturgical Press) 6.

⁸⁴ LG 23, 57 AAS (1965) 27-29.

⁸⁵ Second Vatican Council, Decree *Christus dominus* 11, October 28, 1965: AAS 58 (1966) 677.

boundaries still set by the universal Church.⁸⁶ The application to cemeteries (and burial rites generally) would be to allow diocesan bishops, and by extension, pastors to have more authority over their management.

D. The Provisions of the Current Code

The current Code reflects these changes in theology and practice with reference to funerals and burials in cemeteries in at least four crucial ways. First, it treats Catholic funerals and burials in distinct, although related, places, resulting in slightly different approaches to them. Second, while still emphasizing the importance of the parish to cemeteries and the importance of Catholic cemeteries generally, it no longer requires parishes to have cemeteries, nor is it as adamant about the right to own cemeteries. Instead, it simply states that the Church should own them when necessary. Third, it no longer requires the local ordinary's permission for natural or juridic persons to have cemeteries; rather, the role of the local ordinary is to decide whether they should be blessed and thus made sacred land. Fourth, it increases the discretion of the local bishop in governing cemeteries, including calling for particular law with regard to them.

Regarding the first point, while still addressing the two subjects in a related manner, the current code treats ecclesiastical funerals and cemeteries are treated in different places. In particular, both ecclesiastical funerals and cemeteries are in Book IV. However, the canons regarding ecclesiastical funerals and burials are now in title III of Part II on "Other Acts of Divine Worship," while cemeteries are considered governed by chapter V of Title II in part III on "Sacred Times and Places." Partially as a result of this distinction, the code no longer

⁸⁶ Pontifical Commission for the Revision of the Code of Canon Law, "Principles Which Govern the Revision of the Code of Canon Law," *Communicationes* 2 (1969) 77-83.

requires that a person be eligible for an ecclesial funeral in order to be buried in a Catholic cemetery. That distinction in turn opens up the way for non-Catholics to be buried in a Catholic cemetery.⁸⁷ However, as stated below the bishop is to ensure the sacred character of a Catholic cemetery. And denying a burial to one whose presence would cause scandal may be a part of this responsibility. However, the decision of whether to deny such a burial would rest with the bishop.

Even with regard to those who can receive ecclesiastical funerals, there is broader availability than the 1917 Code allowed in several ways. First, canon 1183 § 2 provides that the local ordinary can permit funerals for infants whose parents intended to baptize them. Second, canon 1183 § 3 provides that the local ordinary can permit an ecclesiastical funeral for baptized non-Catholics if a minister of their own church or ecclesial community is unavailable, unless it would be contrary to the intention of the deceased.⁸⁸ Third, there is no longer a prohibition against cremation, if it is done for reasons that are not contrary to the faith. As a result, people who have their bodies cremated for a legitimate reason can still have an ecclesiastical funeral.⁸⁹ Fourth, while notorious apostates, heretics, and schismatics are still denied ecclesiastic funerals, those who are under the penalty of excommunication or interdict may be given funerals.⁹⁰ With regard to other notorious sinners, the denial of ecclesiastical burials to other sinners depends on

⁸⁷ By analogy, a priest can offer Mass for anyone, living or dead. CIC c. 901. Huels stated that non-Catholics should only be buried in Catholic cemeteries if they have no cemetery of their own. Huels, "Sacred Times and Places" in *The New Commentary on the Code of Canon Law*, ed. John Beal et al. (New York/Mahwah, NJ: Paulist Press, 2000) 1425, 1441 (hereafter *The New Commentary*.) However, he cites as authority for that proposition section 137 of the *Directory for the Application of Principles and Norms on Ecumenism*. That section refers only to the use of Catholic cemeteries (and churches) by *ministers* of other churches and ecclesial communions. Pontifical Council for Promoting Christian Unity, *Directory for the Application and Norms on Ecumenism* (Liberia Editrice Vaticana 1993) translated by United States Conference of Catholic Bishops (Washington, D.C.: United States Conference of Catholic Bishops 1998) 137. It does not forbid the use of such cemeteries by non-Catholics in general. The issue does arise of whether to allow non-Catholic ministers to preside at burial services of their own faithful in a Catholic cemetery. That issue will be addressed in chapter III.

⁸⁸ c. 1183 §§ 2-3.

⁸⁹ c. 1176 §3, 1184 §1, 2°.

⁹⁰ c. 1183 §1, 1°.

whether such a funeral would cause scandal, with doubts to be resolved by the local ordinary.⁹¹

Reflecting the greater understanding that suicide is often caused by mental illness, there is no longer a prohibition against ecclesiastical funerals for those who committed suicide.⁹²

Second, canon 1240 still stipulated that the Church should maintain her own cemeteries where possible, there is no longer a clear statement that parishes should have their own cemeteries. Rather, the emphasis is on the Church in general providing cemeteries to Catholics. In addition, canon 1240 also no longer directly states that the Catholic Church has the right to own her own cemeteries. However, canon 1254, which asserts the Church's innate right to "to acquire, retain, administer temporal goods independently from civil power" would seem to imply a general right to own cemeteries as well.⁹³ But that right would be subject to reasonable limitations on the placement of cemeteries by civil authorities.⁹⁴ In any case, when the Church cannot have her own proper cemeteries, as with the 1917 Code, the next option is to set aside a portion of a civil cemetery that is blessed for Catholics; and, if even that is not possible, individual graves are to be blessed.⁹⁵

It should be noted, however, that it is only when having a cemetery is simply not possible that the Church should rely on these options. The implication is that, where it is possible, the Church ought to establish cemeteries. There is thus a shift in the question of who on behalf of the Church is responsible for providing such cemeteries. For, unlike the 1917 Code, canon 1241

⁹¹ c. 1184 §1, 3°. Such cases of a denial on this ground seem to be rather rare. See John Huels, "Other Acts of Divine Worship" in *The New Commentary*, 1400, 1412-1413.

⁹² Cf. Catechism of the Catholic Church 2282-2283.

⁹³ The consultors of the Commission for the Revision of the Code considered reaffirming this right to possess cemeteries, but rejecting it on a vote of 4 to 3. One reason was that issue was apparently no longer thought of as a live one, presumably because the old prohibitions were no longer in effect. The consultors thought that asserting the Church's overall right to possess temporal goods was sufficient, and that there was no need to address cemeteries in particular. *Communicationes* 12 (1980) 348-349. Cf. Nguyen, 4-9 (discussing this point.)

⁹⁴ *The Canon Law: Letter & Spirit*, ed. by Gerard Sheey et al. (London: Geoffrey Chapman 1995) 697; Nguyen, 33-34. As Nguyen explains, canon 1160 of the 1917 Code both said that legitimate authority of the Church freely governs sacred place and that they should be exempt from civil regulation. Canon 1213 of the 1983 Code only makes the former statement, thus implicitly accepting the role of civil legislation to some degree in sacred places.

⁹⁵ c. 1240 §§ 1-2.

paragraph 1, does not require, but rather permits parishes to have their own cemeteries. In addition, religious institutes are permitted to have their own cemeteries.⁹⁶ It would seem, therefore, that the duty to ensure that Catholic cemeteries are available if that is possible falls more upon dioceses and other particular churches.⁹⁷ However, canon 1180 §1 does still maintain the connection to the parish, saying that, if a parish has a cemetery, deceased parishioners must be buried in it unless they have legitimately chosen otherwise. Thus, the preference is still for burial in the parish cemetery.⁹⁸

Third, in addition to parishes and religious institutes, which are allowed by law to have their own cemeteries, canon 1180 §2 says that other juridic persons and families may also have cemeteries or tombs on their own. The local ordinary can then, if he chooses, have such cemeteries or tombs owned by the other juridic persons or families blessed and thus made sacred land. The implication is that the cemeteries of parishes and religious institutes are to be blessed.⁹⁹ The 1917 Code had said that the other juridic persons (or moral persons, in that code's terminology) needed the permission of the local ordinary even to have such cemeteries or tombs at all. The current code no longer requires that permission, but instead leaves it to the local ordinary to decide whether such a place should be blessed.¹⁰⁰ If a cemetery or tomb is blessed, it becomes sacred land and thus is more a part of the Church herself and more subject to

⁹⁶ Canon 1208 §1 of the 1917 Code gave only exempt religious institutes the right to have their own cemeteries. Other institutes would be included among the other moral persons who would need the local ordinary's permission. The 1983 Code allows all religious institutes this right.

⁹⁷ Huels, "Sacred Places and Times" in *The New Commentary* 1441; Nguyen 14. Huels grants that, in addition to civil restrictions, the lack of land of funding may make cemeteries unfeasible.

⁹⁸ Huels affirms that parishioners may be charged for cemetery plots. However, if space is limited, they should have priority over non-parishioners. John Huels, "Other Acts of Divine Worship" in *The New Commentary* 1400, 1410.

⁹⁹ Huels, "Sacred Places and Times," 1441; Nguyen, 15-16.

¹⁰⁰ The consultors for the revision of canon law believed that should be up to civil authorities to authorize private groups to have cemeteries. Instead, they chose to refocus attention on the decision by Church authorities regarding whether to bless such cemeteries and thus make them sacred ground. *Communicationes* 12 (1980) 350.

her governance. An ordinary would thus have to decide whether such a “private” cemetery should be blessed and then how to ensure its sacred character from that time onward.¹⁰¹

Fourth, the current code reflects the overall policy of subsidiary in allowing local ordinaries much more discretion in governing cemeteries. Instead of the more detailed regulations regarding cemeteries in the 1917 Code, canon 1243 simply states that “particular law is to establish norms about the discipline to be observed in cemeteries, especially with regard to protecting and fostering their sacred character.” Canon 1242 does still forbid the burial of bodies in churches, except for the Roman Pontiff, cardinals, and diocesan bishops. And canons 1205 – 1213, which govern the blessing, use and violation of sacred places in general, apply to cemeteries. Other than that, the code recognizes that the situations vary greatly from place to place. And thus canon 1212 now places much more discretion into the hands of local ordinaries.¹⁰²

There is no notion that the overall goals of prior legislation are less important now than before. Rather, the provision for particular law is a recognition of the need for flexibility in how to ensure the proper functioning and sacred status of a cemetery.¹⁰³ Thus, while the code gives only general direction for that law, there is every reason for adhering to the policies that developed through the 1917 Code, with the adaptations with regard to society and theology as described above. The next chapter will consider how 10 dioceses have done so. And, joining that experience with recommendations from commentators and the Catholic Cemetery Conference of the United States, it will describe several areas that such law should address.

¹⁰¹ Nguyen, 18-19; Rudolf Schunk, “Commentary on Cemeteries” in *Exegetical Commentary on the Code of Canon Law* (English Language Edition), ed. by Angel Marzoa et al, trans. by Ernest Caparros et al. (Chicago, IL: Midwest Theological Forum 2004) 1875, 1880.

¹⁰² Ibid. 1880; *The Canon Law: Letter & Spirit* 698.

¹⁰³ Shunck, 1879-1881.

CHAPTER 3

EXPERIENCE AND PROPOSALS FOR PARTICULAR LAW

In 1999, Francis Morrissey gave a talk during the celebration of the 50th anniversary of the National Catholic Cemetery Conference (later renamed the Catholic Cemetery Conference.) After describing the history and purposes of Catholic cemeteries, Fr. Morrissey described some canonical issues with regard to them, including matters that particular law should take up. He listed 20 such matters, which can be arranged in eight categories: (1) the establishment and blessing of a cemetery; (2) fostering and maintaining the Catholic identity; (3) liturgical care; (4) financial issues; (5) responsibility for protection and maintenance; (6) record-keeping and reports to the diocese; (7) reference to civil law; and (8) ownership and governance issues.¹ One can add to this list two more considerations, the purpose of such legislation and the historic concern for the poor and infants. This chapter will briefly discuss these issues and provide recommendations with regard to them. It will use insights from the Catholic Cemetery Conference and the particular law of ten dioceses: the Archdioceses of Louisville and Newark; and the Dioceses of Altoona-Johnstown, Columbus, Fargo, Hamilton in Ontario, Lafayette in Indiana, Manchester in New Hampshire, Rockford, and Springfield.² The Catholic Cemetery

¹ Frank Morrissey, "Cemetery Ministry: A Canonical Perspective," *Catholic Cemetery* 40 (Nov. 1999) 13-29. In his commentary on canon 1243, Schunck gives a similar list of 13 matters for particular law to consider. Schunck, 1880.

² Archdiocese of Louisville, *Catholic Cemeteries: Rules and Regulations* (Jan. 2019), at mk0archdioceseopcu31.kinstacdn.com/wp-content/uploads/2019/06/Rules-and-Regulations.pdf (hereafter *Archdiocese of Louisville Law*); Archdiocese of Newark, *General Information, Rules and Regulations for the Archdiocese of Newark Cemeteries* (June 2018) at www.rcancem.org/regulations (hereafter *Archdiocese of Newark Law*); Diocese of Altoona-Johnstown, *Handbook for Parish Cemeteries* (Jan. 2002), at www.dioceseaj.org/wpfd_file/cemetery-manual (hereafter *Diocese of Altoona-Johnstown Law*); Diocese of Columbus, *Diocesan Cemetery Regulations* (Nov. 1990), at www.columbuscatholic.org/diocesan-cemetery-regulations (hereafter *Diocese of Columbus Law*); Diocese of Fargo, *Handbook for Catholic Cemetery Operations* (Nov. 2017), at <https://fargodiocese.net/documents/2019/8/Cemetery%20Handbook%20-%20November%202017.pdf> (hereafter *Diocese of Fargo Law*); Diocese of Hamilton, *The Catholic Cemeteries of the Diocese of Hamilton, Operating By-Laws* (Oct. 2012), at www.thecatholiccemeteries.ca/docs/Cemetery-By-Laws.pdf (hereafter *Diocese of Hamilton Law*); *Diocese of Lafayette in Indiana*,

Conference has published several booklets with regard to cemeteries and burials, including: *A Guide to Cemetery Development*; *Administrative and Office Procedures for Smaller Cemeteries*; *Christian Burial Guidelines*; *The Elements of Rules and Regulations for Catholic Cemeteries*; and a *Design and Construction Manual for Catholic Cemeteries*.³ This chapter will use these resources in describing the advice of that Conference.

Two other matters should be noted. First, the particular laws of the diocese noted above were specifically approved by the bishop, and thus could have been legislation. However, they are labelled as such things as “Rules and Regulations,” “Bylaws,” “Handbook” or “Guidelines.” They would thus appear to be more instructions based upon executive authority, rather than legislation.⁴ However, because canon 1243 refers to *iure particulari* rather than *lege particulari*, the canon would encompass such executive actions as general executory decrees and instructions, in addition to legislation.⁵ In fact, it is probably better for most of these rules to take the form of instructions, rather than legislation, because they will often have to be changed

Catholic Cemeteries Rules and Regulations (Feb. 2016), at www.dol-in.org/documents/2016/3/RULES%20%20REGULATIONS%20DIOCESAN%20CEMETERIES%20February%202016.pdf (hereafter *Diocese of Lafayette Law*); Diocese of Manchester, *Cemetery Rules and Regulations* (2016), at <https://www.catholicnh.org/assets/Documents/Parishes/Burials/CemeteryRulesRegulations.pdf> (hereafter *Diocese of Manchester Law*); Diocese of Rockford, *The Rules and Regulations of the Catholic Cemeteries of the Diocese of Rockford* (September 2017), at https://www.rockforddiocese.org/pdfs/catholic-cemeteries/Cemetery-Rules_&_Regulations.pdf (hereafter *Diocese of Rockford Law*); Diocese of Springfield in Illinois, *The Rules and Regulations of the Catholic Cemeteries of the Diocese of Springfield in Illinois* (Jan. 2019), at https://cemeteries.dio.org/uploads/files/policy/Rules_and_Regulations_of_the_Catholic_Cemeteries.pdf. (hereafter *Dioceses of Springfield Law*.) All of these websites were accessed on May 30, 2021, except for the *Diocese of Fargo Law*, which was accessed on June 29, 2021. In 1987, the Diocese of La Crosse promulgated a fairly brief particular law with regard to Catholic cemeteries. Mr. Nguyen analyzed the particular law of La Crosse in chapter III of his thesis. See Nguyen, 38-53.

³ National Catholic Cemetery Conference, *A Guide to Cemetery Development* (Hillside, IL: National Catholic Cemetery Conference, 1983); Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* (Hillside, IL: Catholic Cemetery Conference, 2013); Committee on the Future of the Catholic Cemetery Conference, *Christian Burial Guidelines* (Hillside, IL: Catholic Cemetery Conference, 2005); Smaller Cemeteries Committee and Law and Legislation Committee of the Catholic Cemetery Conference, *The Elements of Rules and Regulations for Catholic Cemeteries* (Hillside, IL: Catholic Cemetery Conference, 2013) (hereafter *Elements of Rules and Regulations*); Catholic Cemetery Conference, *Design and Construction Manual for Catholic Cemeteries* (Hillside, IL: Catholic Cemetery Conference, 1994) (hereafter *Design and Construction Manual*.)

⁴ See c. 34.

⁵ Huels, “Sacred Times and Places,” in *The New Commentary* 1441-1442.

to deal with changing circumstances.⁶ However, to emphasize matters that are more essential and thus very unlikely to change, a bishop may wish to issue legislation about those more essential matters; there could then be instructions regarding the more changeable details. Second, the laws cited above, as well as the guidance of the Catholic Cemetery Conference, also deal with many technical administrative details such as the independent contractors, cleaning, inheritance, payments, and the preparation of land. This paper will address the more specifically canonical aspects of particular law.

A. Statement of Purpose

Pope John Paul II said when promulgating the 1983 Code, that those who promulgate laws should describe their purpose so that those to whom they apply can appreciate them and apply them better.⁷ In addition, it is helpful to remind both the faithful at large and those who are managing and working at Catholic cemeteries of the sacred goal of their efforts. Along these lines, most of the particular laws, and the model rules of the Catholic Cemetery Conference, begin or end with a description of both the purpose of Catholic cemeteries in general and with the rationale for particular legislation or rules with regard to them.⁸

Regarding the purpose of Catholic cemeteries generally, the particular law could emphasize the goals outlined above, most especially: (1) faith in the Resurrection; (2) the honoring of the body that was and will be the Temple of the Holy Spirit; (3) the encouragement to pray for the dead, the reminder of their prayers for us; and (4) the remembrance and

⁶ Catholic Cemetery Conference, *Elements of Rules and Regulations*, 5.

⁷ Cf. John Paul II, *Sacrae disciplinae leges*, AAS 75 (1983), part II (1983) VII-XIV, translated in Code of Canon Law: Latin-English edition xxvii, xxxi.

⁸ *Law of Altoona-Johnstown* 2; *Law of Fargo* 3; *Law of Hamilton* 5, 7; *Law of Lafayette* 3; *Law of Louisville* 4-5; *Law of Manchester* 3,5; *Law of Newark* 8, 94-96; *Law of Rockford* 3, 5

preparation for our own mortality. In the modern world, funeral homes and cemeteries often focus more on promoting generic good feelings.⁹ Catholic cemeteries should make it clear that they offer much more than that, promoting the communion of saints and offering the courage to deal with sorrow with the enduring joy that comes from Christian hope.

Regarding the purpose of legislation, many of the particular laws point out that they are not meant to be an artificial restraint on freedom, but rather are needed to defend the rights of everyone involved, the plot holders, their families, the cemetery and the Church, including her desire to promote reverence. They also rightfully indicate that such laws keep the peace and avoid disputes.¹⁰ But there is another point, namely, that the laws needed for Catholic cemeteries are based upon more than simply the requirements of commercial agreements generally. For Catholic cemeteries do more than provide a service; they help uphold the community of the living, the dead and the Church that unites them both. It is an old saying, “*Ubi societas, ibi ius.*” The laws governing Catholic cemeteries reflect this society of the communion of saints.¹¹

B. The Establishment and Blessing of Catholic Cemeteries

Having described the purposes of Catholic cemeteries and laws governing them, it would be helpful for particular law to give guidance on how a cemetery becomes specifically a Catholic cemetery. As stated above, parishes and religious institutes have the right to establish Catholic

⁹ Sloane, 198.

¹⁰ Cf. Catholic Cemetery Conference, *The Elements of Rules and Regulations*, 3-4 (describing the need for such rules and some principles that should guide their drafting.)

¹¹ The Catholic Cemetery Conference explains that a Catholic cemetery “serves as a symbol of the extended community of believers, a community unbroken by death.” Catholic Cemetery Conference, *Christian Burial Guidelines*, 25.

cemetery with the understanding that their cemeteries would be blessed. However, because doing so would involve the permanent commitment of land, it would very likely be an extraordinary act of administration, for which the permission of the ordinary is needed.¹² Thus, if it has not been provided elsewhere, a provision clearly stating that the establishment of cemeteries is an extraordinary act of administration would be fitting. The particular law should then provide guidance on how to apply for this permission and some standards for granting it. Given that parishes have historically had cemeteries, and canon law still supports this practice, there should be a favorable disposition towards giving this permission if establishing and maintaining a cemetery is administratively feasible. The particular law should also provide guidance on how to arrange for the blessing of the cemetery and how to record this blessing, as required by canon 1208.¹³

Because it would presumably be an act of extraordinary administration, houses of religious institutes would need the permission of their ordinary to establish a cemetery. Unlike a church, a cemetery could be blessed by any ordinary.¹⁴ However, a record of the blessing of such a cemetery would still be required in the diocesan archive.¹⁵ Furthermore, while a religious institute would not need the permission of the diocesan bishop to establish a cemetery, the diocesan bishop still oversees and, within the limits of his authority, has oversight responsibilities regarding any liturgies that take place in them.¹⁶ Thus, particular law should have provisions describing coordination with the diocesan bishop in the establishment of cemeteries of religious institutes and provisions for their liturgies. Furthermore, as Morrissey points out, when parishes are entrusted to a religious institute, it must be clear whether any

¹² Morrissey, 17.

¹³ Nguyen gives a detailed discussion of the requirements of such a blessing in his thesis. Nguyen, 22-28.

¹⁴ c. 1207.

¹⁵ c. 1208.

¹⁶ Cc. 835§1, 838§§ 1,3, 839 §2.

cemetery is that of the religious institute, and presumably for them, or whether it is a cemetery of the parish, and thus under full diocesan governance.¹⁷

The issue is different if a family or another group wishes to establish a cemetery. They do not need the permission of the diocesan bishop to do so. However, in order for the cemetery to be a Catholic cemetery and thus a sacred place, it would need the blessing of the diocesan bishop, or by a bishop or priest authorized by him.¹⁸ The particular law should outline how to request such a blessing, the effects of the blessing, and the standards that need to be met in order for such a blessing to be conferred. Thus, for example, there would presumably have to be guarantees that the cemetery will be maintained as a sacred place and that the laws governing the cemetery will be followed.¹⁹ It would have to be clear that, once the cemetery is blessed, it becomes a sacred place, and is thus governed by canon law and particular law regarding sacred places in general and cemeteries in particular.²⁰

Along these lines, of the particular laws under consideration, only that of the Springfield Diocese addresses the issue of cemeteries owned by organizations other than the diocese or parishes. It says that cemeteries owned by religious institutes are not covered by the diocese's law on cemeteries. By contrast, the cemeteries owned by cemetery associations would typically be governed as parish cemeteries, with differences in the manner of governance and where the records are kept.²¹ The laws of the other dioceses seem to assume that all of the cemeteries are

¹⁷ Morrissey, 17.

¹⁸ The blessing would generally be given by an ordinary. However, the ordinary can delegate a priest to give the blessing of a cemetery. Canon 1207. Nguyen discusses who is the ideal bishop or priest to give the blessing in different circumstances. Nguyen, 15-27.

¹⁹ See Schunck, 1880. Of the dioceses considered, the particular law of only one of them even considers cemeteries owned by entities other than the diocese or parishes, and even that law does not describe the process for applying for this blessing.

²⁰ Cf. c. 1213.

²¹ *Law of Springfield* 5, 14.

owned by the diocese or its parishes. And none of them address how a parish would obtain permission and the blessing for a new cemetery.

C. Catholic Identity

Particular law should also ensure the Catholic identity of blessed cemeteries. Most of the particular laws have provisions on this point and address three overall issues: (1) markers and monuments for the dead; (2) ensuring that activities in a cemetery are consistent with its purposes; and (3) provisions dealing with the burial of non-Catholics and with non-Catholic liturgies. Regarding markers and monuments, all of the particular laws provide that the cemetery management (e.g., the governing board, the pastor of a parish that owns the cemetery) must approve of any design for them. A few of them add specific standards, such as provisions that only Christian symbols may be on such markers, or provisions that there must be a cross on the markers.²² In addition to requiring approval, it would be helpful to give such general standards about what is allowed.

Regarding activities in the cemetery, as stated above, this issue has been a concern in the past. Canon 1210 of the current code says, “Only those things which serve the exercise or promotion of worship, piety, or religion are permitted in a sacred place; anything not consonant with the holiness of the place is forbidden. In individual cases, however, the ordinary can permit other uses which are not contrary to the holiness of the place”²³ Thus, particular laws often state

²² *Law of Altoona-Johnston*, 7, 10-11 (allowing only Christian symbols); *Law of Newark* 61, 69, 72, 77 (generally allowing only Christian symbols, requiring a cross, and rules governing flags); *Law of Columbus* 12 (the markers must have Christian symbols; other symbols allowed if consistent with Christian teachings); *Law of Hamilton* 29 (markers must have a cross); *Law of Manchester* 23 (memorial symbols must be Christian.)

²³ c. 1210: In loco sacro ea tantum admittantur quae cultui, pietati, religioni exercendis vel promovendis inserviunt, ac ventatur quicquid a loci sanctitate absonum sit. Ordinarius vero per modum actus alios usus, sanctitati tamen loci non contrarios, permittere potest.

clearly that such things as business dealings, advertising, and picnics, although suitable in other locations, are not permitted in cemeteries.²⁴ It is true that there may on occasion be a request for some good, but not specifically religious, activity, such as a patriotic or historical ceremony. Some particular laws provide that, in such cases, the sponsor can ask for permission from a designated authority.²⁵

There is also the issue of the burial of non-Catholics in Catholic cemeteries, which is permitted, but which may raise some other issues.²⁶ Most of the particular laws have a provision for asking the owner or management of the cemetery for permission for the burial of non-Catholics.²⁷ Some of the particular laws say that non-Catholic spouses and family members of Catholic can be buried in the Catholic cemeteries; and for other non-Catholics permission is needed.²⁸

If a non-Catholic is buried in a Catholic cemetery, the issue arises of whether a non-Catholic minister can celebrate the rites of his Church or community in a Catholic cemetery. The Ecumenical Directory says that the local bishop may permit a non-Catholic minister to celebrate the rites of his faith in a Catholic church or cemetery if his own place of worship is

²⁴ *Law of Altoona-Johnstown* 15; *Law of Columbus* 8; *Law of Hamilton* 9; *Law of Lafayette* 6; *Law of Louisville* 31; *Law of Manchester* 7; *Law of Newark* 27-28, 31. Some of the laws specifically refer to assemblies or insignia at burials that the cemetery official can forbid, or that are forbidden, on the grounds that they contrary to the Catholic faith. *Law of Columbus* 1-2; *Law of Fargo* 21; *Law of Hamilton* 9; *Law of Lafayette* 13; *Law of Newark* 53; *Law of Rockford* 15. The Catholic Cemetery Conference also has examples of activities that would be regulated or forbidden in a Catholic cemetery. Catholic Cemetery Conference, *Elements of Rules and Regulations* 11.

²⁵ Cf., *Law of Newark* 11.

²⁶ Thus, for example, it would be generally preferred for spouses in a mixed or inter-faith marriage to be buried together. There may also be non-Catholic members of a Catholic family whom the family wishes to be buried in a Catholic cemetery. National Catholic Cemetery Conference, *Christian Burial Guidelines* 26.

²⁷ *Law of Lafayette* 6; *Law of Louisville* 7; *Law of Springfield* 8. The Diocese of Springfield adds that, if a burial would cause scandal (e.g., the burial of a notorious schismatic, apostate, or manifest sinner, the local ordinary should be consulted.)

²⁸ *Law of Columbus* 1; *Law of Manchester* 7; *Law of Newark* 10; *Law of Rockford* 12. Two of the particular laws also clarify that pets cannot be buried in a Catholic cemetery. *Law of Lafayette* 6; *Law of Newark* 28.

unavailable.²⁹ If a non-Catholic is buried in a Catholic cemetery, clearly the other minister's place of worship is not available for the burial rites, for such rites would presumably be at the place of burial. Thus, the ordinary could give permission for a non-Catholic minister to celebrate these rites in a Catholic cemetery. Some particular laws address the point of other liturgies in the cemetery.³⁰ But in most cases, the law does not consider this issue. The particular law could make it clear that this permission is needed in these cases; and it could state whether the bishop has delegated the pastor or another official authority to grant such permission.

D. Liturgies and Spiritual Care

Likewise, particular law should consider how liturgical rites and other spiritual care are provided at a Catholic cemetery. On this point, there are at least two issues to be addressed: (1) who is responsible for providing liturgies at the cemetery, or for ensuring that they are provided; and (2) whether funerals and other Masses can be offered in a cemetery chapel. Regarding the provision of liturgical services, ordinarily the cleric who presides at the funeral would also preside at the burial. But sometimes the two liturgies are far distant from each other. In addition, families may request other prayers for the deceased, e.g., on the anniversary of the death; or other groups may request prayers. If the cemetery belongs to a parish or a clerical

²⁹ *Ecumenical Directory*, 137. The *Ecumenical Directory* addresses only relations with other Christian Churches or ecclesial communities. If it is a non-Christian who is to be buried, one would have to rely upon the bishop's overall authority to allow uses of a sacred place that are not contrary to the holiness of the place, as provided for in canon 1210. However, according to that canon, such permission would have to be given on an individual basis. The Catholic Cemetery Conference favors allowing non-Catholic ministers to use their own rites at a Catholic cemetery if the deceased is a member of their church or denomination. National Catholic Cemetery Conference, *Christian Burial Guidelines*, 26-27.

³⁰ *Law of Altoona-Johnstown* 12 (all liturgies in the cemetery must be consistent with Catholic teachings); *Law of Manchester* 7 (non-Catholic liturgies require the approval of the cemetery management.)

religious institute or society of apostolic life, its clerics would presumably be the one to provide the liturgies. However, if the cemetery belongs to the diocese, a women's religious institute or another group or family, the question arises about whether the pastor of the local parish will provide the spiritual care, or whether another priest will be designated. The same priest may be the one to give permission for a priest from outside of the diocese or a non-Catholic minister to celebrate burials or other rites at the cemetery. Morrissey advised that particular law should address the point of whether a cleric is assigned to the cemeteries; however, one of the particular laws addresses this point.³¹

Regarding liturgies at a cemetery chapel, canon 1177 states the presumption is that funerals will be at the parish church of the deceased. However, funerals can be at another church with the consent of the person who governs it.³² Because canon 1177 refers specifically to other churches, funerals would not be in chapels or oratories.³³ Thus, if funerals are allowed in a cemetery chapel, it should be dedicated as a church. Even if it is not dedicated as a church, particular law could clarify whether memorial Masses can be celebrated there.³⁴ There is also the question of whether non-Catholic ministers would be allowed to celebrate funeral rites in such a chapel. As with burials in cemeteries and churches, according to the *Ecumenical Directory*, the bishop can give permission for such rites to take place in a Catholic building.³⁵ Three dioceses address the question of Masses in a cemetery chapel, with one of them allowing Masses at the

³¹ Morrissey, 28.

³² c. 1177.

³³ Huels, "Other Acts of Divine Worship", 1409.

³⁴ Canon 1194 of the 1917 Code provided that the local ordinary could permit habitual Masses in cemeteries, even those owned by private persons as their oratories.

³⁵ *Ecumenical Directory* 137.

cemetery chapel, another one saying that the cemetery chapel is not to be used for the funeral, and a third saying that the cemetery management can approve of Masses in the chapel.³⁶

E. Financial Issues

With regard to finances, at least three issues should be considered by particular law: (1) the overall financial management of the cemetery; (2) the maintenance of cemetery funds; and (3) the use of surplus funds that may be raised. If a cemetery belongs to the diocese, a parish or another public juridic person, the law provides that its funds would be ecclesial goods under the vigilance of the bishop by the law itself.³⁷ Even if another person or persons owns the cemeteries, its funds would be for a sacred purpose and for sacred land. As a result, the assets would have a strong relationship to the Church, and their use would reflect upon it. Consequently, a bishop would ideally ensure that they are managed properly.³⁸ In the secular realm, some cemeteries have become notorious because of the poor financial management, negligence, and even financial manipulation.³⁹ It is important to the Church that people who manage Catholic cemeteries are known for their honesty and reliability.

The particular laws under consideration do not address overall financial management generally; it could be that this governance comes under rules regarding parishes and diocesan entities generally. However, one rule that almost all the particular laws have is a prohibition on

³⁶ *Law of Louisville* 22 (chapel only for committal prayers; unclear for later Memorial Masses); *Law of Hamilton* 3, 17 (Masses allowed at the cemetery chapel); *Law of Manchester* 7 (management approval needed for Masses at the cemetery chapel.)

³⁷ c. 1276.

³⁸ Morrissey, 17.

³⁹ Greene, 75; Sloane, 193.

employees receiving revenue beyond their salary compensation from families or relatives.⁴⁰

These provisions are apparently an attempt both to avoid favoritism and to continue the policy of the Second Council of Baltimore that church employees should not profit from Catholic cemeteries. In addition, the Diocese of Springfield requires the cemeteries to have insurance and for a list of their fees to be published.⁴¹

With regard to perpetual care in particular, seven of the dioceses required a fund for this purpose.⁴² Of those seven, four of them had a specific minimum contribution (e.g., 20 percent of the sales price for the graves.⁴³ The owners of a cemetery are making a permanent commitment to maintain the graves. Accordingly, it is appropriate to require a fund for this purpose, both to ensure that the commitment will be carried out and to avoid burdening future generations with an unfunded obligation. As a result, many state governments require perpetual care funds.⁴⁴ Such requirements often do not apply to churches, governments or other non-profit cemeteries.⁴⁵ But, as the Second Council of Baltimore emphasized, the concern is as applicable to Catholic cemeteries as it is to private ones.⁴⁶ Local governments may also be more favorable to church

⁴⁰ *Law of Altoona-Johnstown* 6; *Law of Columbus* 9; *Law of Fargo* 19; *Law of Hamilton* 10; *Law of Louisville* 31; *Law of Manchester* 19; *Law of Newark* 9; *Law of Rockford* 16. Cf. Catholic Cemetery Conference, *Elements of Rules and Regulations* 12 (also recommending this principle.)

⁴¹ *Law of Springfield* 10-11, 20.

⁴² *Law of Altoona-Johnstown* 12-13, 21; *Law of Fargo* 5; *Law of Hamilton* 7; *Law of Lafayette* 10, 13; *Law of Louisville* 28; *Law of Newark* 16; *Law of Rockford* 17; *Law of Springfield* 11.

⁴³ *Law of Altoona-Johnstown* 12-13, 21; *Law of Fargo* 5; *Law of Hamilton* 7; *Law of Lafayette* 10, 13; *Law of Louisville* 28; *Law of Newark* 16; *Law of Rockford* 17; *Law of Springfield* 11.

⁴⁴ Marsh, "The Regulation of Cemeteries, in *Cemetery Law*, 297.

⁴⁵ See, e.g., Ill. Comp. Stat. 760/2, 4 (requiring 15% of the sale price of graves in cemeteries to be set aside in a perpetual care fund; the provision applies only to "privately owned cemeteries," a group that does not include cemeteries owned by governments, churches, or fraternal organizations); Va. Code §54.1-2312, 2316 (requiring 10% of the sale price of graves in cemeteries to be set aside in a perpetual care fund; but exempting from regulations cemeteries owned by governments, churches, and some non-profit corporations); Sloane, 195 (describing the exemption of churches from some early cemetery legislation.)

⁴⁶ Cf. Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* 7-8; Sloane, 203-206 (describing the difficulties experienced by many cemeteries because of their inadequate perpetual care funds.) One can also provide for future care by charging an annual maintenance fee for the care of the plots. However, once the person is buried in the grave plot, it can be difficult to persuade the relatives to continue making this payment. Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* 7. Sloane, 204.

cemeteries if there is a fund to care for them, helping to guarantee that they will be well kept.⁴⁷

It is also preferable that such funds are to be kept in an irrevocable trust, not merely as an accounting entry.⁴⁸

With regard to the use of surplus funds, parishes and other entities may be able to fund other ministries from such a surplus. In addition, if it has or could become financially unfeasible to keep a church open, raising funds from a cemetery would likely be a better alternative to reducing the church to profane use and then alienating the building. At the same time, there is the concern that Catholic cemeteries be dedicated for sacred purposes, rather than for fundraising as commercial enterprises would be. Thus, as stated above, there has been an historic disapproval of making profits from grave plots. The Second Council of Baltimore took a middle view, saying that excess cemetery funds could be used purposes other than for the cemetery, but they had to be dedicated to religious or charitable works. Three of the particular laws under consideration have addressed this issue. Two of those laws say that all cemetery funds are to be used only for

⁴⁷ Marsh, “The Regulation of Cemeteries, in *Cemetery Law* 297.

⁴⁸ Cf. Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* 7. The particular laws under consideration do not specifically address this point. And in fact, the Diocese of Fargo says that the perpetual care fund of a parish cemetery is not to be considered separate from the parish. *Law of Fargo* 11, 18. The problem with having such the cemetery funds merely in a general account is that they are not protected from creditors if the entity that owns the cemetery goes into bankruptcy. This issue is exemplified by the case of *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015). In that case, the Archdiocese of Milwaukee had for years saved money to care for the cemeteries. But those funds were only an item in the general savings of the archdiocese, not a legally separate trust fund. In 2007, Archbishop Timothy Dolan transferred the \$55 million that had been saved for this purpose to a legally separate perpetual care trust for the cemeteries. When the archdiocese declared bankruptcy in 2011, the unsecured creditors argued that this money should be available to satisfy their claims on the grounds that it had been transferred to benefit the archdiocese. The appellate court held that the creditors had a potential claim, and sent the case back to the lower court to resolve the issue. The lower court did not issue a ruling because the Archdiocese soon settled with the creditors, using some of the money in the perpetual care fund. “Archdiocese of Milwaukee reaches \$21 Million Settlement with Abuse Survivors,” *Milwaukee Business Journal* (Aug. 4, 2015.) If the funds had been in a trust all along, there would never have been an issue.

the cemetery.⁴⁹ The Diocese of Fargo's laws require that surplus funds from cemeteries be forwarded to the diocese to be used for works of religion, education, and charity.⁵⁰

F. Maintenance and Protection

Related to the issue of cemetery funds is the responsibility to maintain and protect them. In this context, at least three general issues should be addressed: (1) ensuring responsibility for the maintenance of the cemetery; (2) protection against violations of the cemetery; and (3) reconciliation of a cemetery if there has been a violation. Generally, the ordinary is to exercise vigilance over the management of ecclesiastical property.⁵¹ But this responsibility is particularly acute in the case of cemeteries, for they are sacred grounds. And the gradual decay and neglect of cemeteries has historically been a prominent issue in the United States.⁵² Conversely, if the Catholic Church is known for maintaining well-kept cemeteries, it will be easier to gain zoning approval for new ones.⁵³ Thus, laws regarding cemeteries could require that each cemetery have a plan for maintaining the grounds and assign a specific person or people for the responsibility of carrying it out.⁵⁴ The particular laws under consideration do not have provisions regarding maintenance plans, except the general obligation to maintain the cemeteries well. Two of the

⁴⁹ *Law of Rockford* 17; *Law of Springfield* 11. The Catholic Cemetery Conference also supports this principle. Catholic Cemetery Conference, *Elements of Rules and Regulations* 13.

⁵⁰ *Law of Fargo*, 5, 13. If such surplus funds must be turned over to the diocese, one does have to ask whether the owner of the cemetery will really make any effort to have such funds, or will instead make sure that all of the revenue is spent or reserved for another purpose.

⁵¹ c. 1276.

⁵² American Society of Planning Officials, "Information Report No. 16" (195) in *Cemetery Law* 200-201; Sloane 24, 241-242.

⁵³ Catholic Cemetery Conference, *A Guide to Cemetery Development* 8.

⁵⁴ The Catholic Cemetery Conference recommends that the pastor of a parish with a cemetery either appoint a specific lay person to manage the cemetery or have a committee assist him in this role. Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* 11-12.

dioceses do say that a parish that has a cemetery must appoint a cemetery committee to help the pastor run the cemetery; another diocese recommends such a committee.⁵⁵

In addition, as has historically been the case, robberies, vandalism, and other crimes are a continuing concern for cemeteries.⁵⁶ Thus, the 1917 Code required that cemeteries be enclosed and locked. The current code does not have that specific requirement, but the concern for protection is still present. Thus, particular law could require plans (e.g., patrols, cameras, lighting, and/or enclosures) to protect against criminal or unworthy actions in the cemeteries. This concern for preventing wrongful acts is reflected in the provision of the current Code that calls for the local ordinary to determine what actions constitute desecration of a sacred place and when a penitential rite is required before future liturgies take place.⁵⁷ Along these lines, particular law could both describe what sort of acts constitute desecration of the cemetery and how to arrange for a penitential act to restore the cemetery if such desecration occurs.⁵⁸ The particular laws under consideration do not have provisions on these points.

G. Record Keeping and Reports

As with the 1917 Code, the current code requires that, after a burial, a record is to be made, in accordance with particular law.⁵⁹ Unlike the 1917 Code, the current code does not specify what is to be recorded, leaving the matter to particular law. Thus, one matter that particular law should address, for Catholic funerals and burials anywhere, is the records to be

⁵⁵ *Law of Altoona-Johnstown* 19 (requiring such a committee); *Law of Fargo* 12-13 (recommending a committee); *Law of Springfield* 9-11 (requiring a board of directors, forbidding allowing funeral homes to manage the cemetery).

⁵⁶ Greene, 84-85; Marsh, “Desecration” in *Cemetery Law* 383-384.

⁵⁷ c. 1211.

⁵⁸ Power describes the sort of actions that would constitute such a desecrations. Power, 169-184. While his commentary was written under the 1917 Code, it can provide useful guidance for current particular law.

⁵⁹ c. 1182.

kept, and where they are to be kept. The 1917 Code required that the name and age of the deceased, the name of the parents or spouse, the time of death, the one who ministered the sacraments to the deceased, and the time and place of burial should be recorded.⁶⁰ The current law is more flexible, but those considerations would be a good starting point for particular law to address.

With regard to Catholic cemeteries in particular, the current code, like the 1917 Code, requires that a record of the blessing of Catholic cemeteries is to be kept in the diocesan archives.⁶¹ However, for many other reasons, careful record-keeping is essential, such as proper maintenance, respecting the rights of those who purchased the right to use the graves, and providing information to family and friends.⁶² Many states also require that a record of the burials and locations be sent to government authorities.⁶³ Three of the particular laws under consideration describe records that must be kept by Catholic cemeteries.⁶⁴ In addition, to ensure that the owners of cemeteries are adhering to the law regarding cemeteries and maintaining them properly, dioceses may wish to require periodic reports be sent to the diocese in regard to these matters, as two of the dioceses under consideration do.⁶⁵

⁶⁰ 1917 Code c. 1238.

⁶¹ c. 1208.

⁶² Cf. Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* 2-6, 11 (describing some of the records that should be kept in cemeteries); C. Allen Schafer, “Family, Community, and Churchyard Burials in America” in *Cemetery Law* 248-249 (describing the problems resulting from the lack of records of many old cemeteries.)

⁶³ Marsh, *The Law of Human Remains* 63.

⁶⁴ *Law of Altoona-Johnstown* 20; *Law of Newark* 14-15; *Law of Springfield* 21-23.

⁶⁵ *Law of Altoona-Johnstown* 19; *Law of Springfield* 12, 21.

H. References to Civil Law

In the twentieth century there has been increased regulation of cemeteries by state governments. Many of these laws do not apply to church cemeteries, but each diocese would have to determine whether any or all of them do.⁶⁶ In any case, there are several other issues of civil law that would be applicable. For example, all states have statutes governing the treatment of corpses, which apply to all cemeteries.⁶⁷ Furthermore, if cemeteries provide services such as the transportation and preparation of the body, they may also be subject to state laws regarding such services.⁶⁸ If a cemetery wishes to expand, the consent of the zoning board or another municipal commission is often required.⁶⁹ With regard to financial assistance, the federal government pays for part of the burial costs of some veterans.⁷⁰ And in some places, there are government programs that help fund the burials of indigents.⁷¹ It is helpful if the particular law refers to these obligations and benefits, and gives a description of where to find a summary of them. Three of the dioceses under consideration have a specific reference to such civil laws.⁷²

I. Ownership Issues

Morrissey recommends that dioceses and religious institutes consider making each cemetery its own public juridic person in order to clarify that its assets are distinct from the entity that owns it. In addition, if a blessed cemetery is owned by a person or organization other

⁶⁶ Marsh, *The Law of Human Remains* 62.

⁶⁷ See part II of *The Law of Human Remains*, where Tanya Marsh describes the laws of each state in this regard.

⁶⁸ Marsh, *The Law of Human Remains* 72-74.

⁶⁹ Catholic Cemetery Conference, *A Guide to Cemetery Development* 7.

⁷⁰ Marsh, *The Law of Human Remains*, 21-22; Sloane, 233.

⁷¹ Cf. *Law of Newark* 89-90 (describing such provisions in New Jersey law.)

⁷² *Law of Fargo* 7-10; *Law of Newark* 9 (subsequent cross references to civil law throughout the document); *Law of Springfield* 17.

than a diocese, parish, or religious institute, such an establishment as a public juridic person would make it clear that the cemetery is under the governance of the local ordinary.⁷³ It may also be helpful to incorporate cemeteries separately under civil law in order to insure their assets are protected from liability if the person who owns it becomes financially insolvent. Such incorporation would also protect the entity that owns the cemetery from liability that may occur in the cemetery.⁷⁴ Furthermore, there should be provisions that ensure that a cemetery remains the property of the Church, or at least under the Church's control, if the land surrounding a cemetery is sold (e.g., if a religious institute closes its house in a diocese, or if the private owners of the land surrounding the land of a blessed cemetery sell the land.)⁷⁵ In such cases, if the land and other assets of the cemetery are separately incorporated, the local ordinary can more easily ensure that that property of the cemetery remains with people who are governed by the Church, or even that it is transferred to the diocese itself, even if the rest of the property is sold. None of the particular laws addresses this possibility. In fact the Diocese of Fargo expressly says that parish cemeteries must be legally a part of the parish.⁷⁶ The Dioceses of Fargo and Springfield do provide that, if a parish merger has resulted in a parish owning more than one cemetery, the funds for the cemeteries must be kept distinct from each other.⁷⁷ None of the particular law considers the possibility that the land surrounding a Catholic cemetery will be sold.

⁷³ Morrissey, 16-17.

⁷⁴ For a similar reason, in 1911, the Sacred Congregation of the Council said that American dioceses should, if possible, separately incorporate each parish. Sacred Congregation for the Council, Letter "Methods of Holding Title to and Administering Church Property in the United States" (July 29, 1911) CLD 2:443-445. Mark Chopko describes three methods of civilly recognizing the separate existence of parishes in "Principal Civil Law Structures: A Review," *The Jurist* 69 (2009) 237 – 260. Those methods could also be used for cemeteries.

⁷⁵ Morrissey, 17; cf. c. 1213 (the ecclesial authority is to have authority over sacred places.)

⁷⁶ *Law of Fargo* 11, 18.

⁷⁷ *Law of Fargo* 13; *Law of Springfield* 13.

J. Provisions for the Poor and Infants

The provision of decent burials for people whose families or estates cannot afford them has historically been a concern of Catholic cemeteries; it is still an issue in society today.⁷⁸

Canon 1181 states that the poor are to be given fitting funerals. There is no specific provision in the current code regarding burials for the poor in Catholic cemeteries, as there was in the 1917 Code.⁷⁹ However, promotion of this practice follows on canon 1181 and of the historical purpose of Catholic cemeteries. In addition, the provision of canon 1180 §1, that members of a parish are presumptively to be buried in the parish's cemetery, would imply that the poor should be given such a burial even if they cannot afford it. Thus, it would make sense for particular law to require or at least recommend that Catholic cemeteries make provisions for the poor.⁸⁰

Funding for such grave sites and burials could come from the price of sales of burial plots, requests for donations, or in some places from government programs. The Diocese of Newark has both a diocesan fund to assist with the burial of those with limited means, and describes a government program that also gives assistance.⁸¹

The Archdiocese of Louisville provides a special place in one of its cemeteries for infants.⁸² The 1917 Code specifically called such a special place in Catholic cemeteries for infants.⁸³ The current code does not mandate such a provision. However, while not required, particular law could encourage Catholic cemeteries likewise to set aside an honored place for

⁷⁸ Sloane, 200-201.

⁷⁹ 1917 Code canon 1235 §2.

⁸⁰ The Catholic Cemetery Conference does not specifically address this issue. But it does say that there should be a range of prices for cemetery plots so that the cemetery can meet the needs of all Catholics. Catholic Cemetery Conference, *Administrative and Office Procedures for Smaller Cemeteries* 9. In some cases, that amount would be below any market price.

⁸¹ *Law of Newark* 88-90.

⁸² *Law of Louisville* 24.

⁸³ 1917 Code c. 1209 §3.

infants, including those who have died by miscarriage. They could also encourage cemeteries to offer such plots without, supported by donations for this purpose. Such a special recognition of infants would be a powerful witness to Christian charity, the dignity of life, and Christian faith and hope in the Resurrection.⁸⁴

⁸⁴ National Catholic Cemetery Conference, *Christian Burial Guidelines*, 32 (recommending such a place for infants in Catholic cemeteries.)

CONCLUSION

In a 1949 address to the American Cemetery Association entitled “An Infant is Born,” Reverend William Casey described why there was a specific need for the National Catholic Cemetery Conference.¹ He thanked the American Cemetery Conference, which joined together religious and secular cemeteries of all types, for promoting ethical standards, advanced methods of land development and record keeping, insights into perpetual care, and progress in civil legislation². However, he described why the Catholic Church needs her own cemeteries, and thus benefits from her own American cemetery conference, based upon her specific theology and devotions about the communion of saints and about the Resurrection.³ He argued that the distinction between Catholic and other cemeteries should not be considered a negative thing. Rather, he argued, as Catholic cemeteries benefitted from their interaction with other cemeteries, other cemeteries could benefit from the Catholic Church’s witness to the deepest and most sacred reasons for reverence toward the dead.⁴

Casey’s insights from 72 years ago are at least as applicable today as they were then. The laws and policies governing Catholic cemeteries should proclaim the Church’s theology about the communion of saints and the Resurrection. In so doing, they should encourage prayers for the dead, requests for their prayers, inspiration from the virtues of the dead generations, and Christian hope and final joy even in the midst of sorrow. As both St. Augustine and Fr. Casey have pointed out, by reminding people of the reality of death and of our calling towards a greater realm, cemeteries also encourage better lives on earth. But even in the context of promoting a

¹ Casey, “An Infant is Born” in *God’s Acre*, 49-74.

² Ibid., 68-70.

³ Ibid., 56-66.

⁴ Ibid., 71-74.

specifically Catholic theology, Catholic cemeteries can benefit from modern insights and developments, such as in the fields of finance, management, ecumenism, and involvement in civil society. By promoting the Church's timeless theology and spirituality in the midst of the modern world, particular law can help dioceses and parishes act, in the words of Jesus "like a householder who brings out of his treasure what is new and what is old."⁵ In so doing the Church will help all people have confidence that, as one of the funeral prayers say, "for your faithful, Lord, life is changed, not ended, and when this earthly dwelling turns to dust, an eternal dwelling is made ready for them in heaven."⁶

⁵ Matt. 13:52.

⁶ Preface I for the Dead, in *Daily Roman Missal, English translation* (Woodbridge, IL: Midwest Theological Forum, 2010) 763, quoted in *Catechism of the Catholic Church* 1012.

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