THE STANDING OF THE DEAD: SOLVING THE PROBLEM OF ABANDONED GRAVEYARDS

> Beneath those rugged elms, that yew-tree's shade,
> Where heaves the turf in many a mould'ring heap,
> Each in his narrow cell for ever laid,
> The rude Forefathers of the hamlet sleep.
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> ….
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> Yet ev'n these bones from insult to protect
> Some frail memorial still erected nigh,
> With uncouth rhimes and shapeless sculpture deck'd,
> Implores the passing tribute of a sigh.
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> — Thomas Gray, *Elegy Written in a Country Church Yard*, *in* THE OXFORD BOOK OF ENGLISH VERSE 278, 280 (Christopher B. Ricks ed., Oxford Univ. Press 1999) (1750).

I. INTRODUCTION

Beneath the elms and yews of thousands of rural communities lie abandoned and neglected burying grounds of the last two centuries. Because of the strong sense of community, faith, and tradition in rural America,[1] property law never took into account the possibility of a day when there would be both pressure to reuse cemetery land and no one left with legal standing to represent the interests of those buried there.

The same sense of continuity and community and the historical development of burying grounds in America contributed to the lack of public and private planning for the continued maintenance of these grounds. With an eye fixed on the eternal, communities and congregations never dreamed of the eventual dissolution of their churches or the scattering of their families to an opening frontier or a developing urban center.

Today, those who would protect "these bones from insult" and those who would develop or more efficiently farm the rural landscape face case law and statutory provisions that define specific rights and responsibilities, but preclude a proper forum to decide disputes. Instead, there is in each of these shaded and decaying sacred plots a stalemate between the rights of the dead and the wishes of the living. Protectors and developers alike are

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[1] *See* Steven C. Bahls, *Judicial Approaches to Resolving Dissension Among Owners of the Family Farm*, 73 Neb. L. Rev. 14, 16 (1994).

able and willing to represent their viewpoints. The usual adversarial system fails because there is no one with standing to represent the dead.

This Comment first gives a brief background of the development of burying grounds in America to aid in defining exactly what type of cemeteries give rise to these issues. In the second section, the case law supporting the enduring property rights of the decedents in regard to these so-called "pioneer" cemeteries[2] is summarized, along with the state statutory provisions for the maintenance or removal of these pioneer cemeteries once they are classified as abandoned or neglected. In the final section, this Comment proposes statutory and judicial policy changes to break the stalemate arising from the lack of standing of distant relatives to pursue maintenance or disinterment with eventual sale. Policy changes and statewide funding measures are also recommended to relieve political and economic pressure on local officials who are mandated to provide unfunded care for these sites. By providing a court-appointed receiver for the property rights of these decedents, this Comment argues that a proper adversarial resolution can be crafted at the local level to problems of abandoned cemeteries. This Comment also briefly recounts a model of legislative attention in Wisconsin to the provision of small but stable sources of state funding to assist local officials in this effort.

II. THE OLIVE BRANCH CEMETERY

This rural Ohio cemetery is one of thousands of places in modern America where the property rights of the dead, the sentiments of the living, and economic and political reality stand in stalemate. A brief statement of the facts regarding this property and its legal status illustrates the issues facing rural communities containing early American burial sites in every jurisdiction.

Hidden now beside a freeway overpass, this acre and its sixty graves were originally the gift of a Revolutionary War soldier to his country church.[3] In the deed of gift, the donor gave to the Olive Branch Methodist Church a fee simple, with instructions that the land "be maintained forever as a temple to Jesus Christ and a burying ground for the faithful departed."[4]

For a hundred years, the Olive Branch Church and its cemetery was an important but unremarkable link in the life of its township. Like many of its counterparts,[5] the Olive Branch Church did not keep records of the allocation of plots, and no deeds, contracts, or agreements are known to

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2 *See* DAVID CHARLES SLOANE, THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY 14 (1991).

3 *History of Olive Branch Cemetery*, *in* Warren County, Ohio Genealogical Society Collection (1985).

4 Deed of Record, Parcel No. 7208120, Warren County, Ohio Recorder's Office.

5 SLOANE, *supra* note 2, at 14.

survive for individual burial plots.[6] The Olive Branch Church dissolved as a consequence of the depression of the 1930s, and by that time there had been fewer and fewer burials with the passage of years—as an urbanizing America drew families from the farms.[7]

Under Ohio law at the time (as is still the case in Ohio and many other states), the fee interest in the land comprising the abandoned Olive Branch Cemetery was transferred to the trustees of Washington Township, Ohio in 1932.[8] Like most family and rural church burying grounds, there were no maintenance funds associated with the transfer,[9] although Ohio law mandated then (as now) the continuing maintenance of the grounds by the trustees.[10]

In the next seventy years, the surrounding acres of land would first be transected by one of Ohio's major North-South freeways,[11] and the location of an important exit would pass directly next to the abandoned Olive Branch Cemetery.[12] Oil companies and land development firms would purchase the surrounding area,[13] but the location of the cemetery—precisely where a gas station would be located at the end of the southbound exit ramp—would remain a problem. Meanwhile, the cemetery itself sunk into complete disrepair as the Township ceased even to mow the area in the 1980s, claiming rattlesnake infestation.[14]

The remaining monuments continue to degrade, vegetation is taking over the site, and the only sign of human attention to the site is the presence of beer cans and fast food wrappers.[15] Those trying to preserve the site—distant relatives living in other areas—have found that they lack

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6 *History*, *supra* note 3.

7 *History*, *supra* note 3.

8 Deed of Record, Parcel No. 7208120, Warren County, Ohio Recorder's Office.

9 Current Ohio law mandates the formation of a maintenance endowment upon the creation of a new cemetery. OHIO REV. CODE ANN. § 1721.21 (West 2002). For this reason, the problems of abandoned and neglected cemeteries should rarely be faced by future citizens. However, the property rights of decedents will still endure, and disputes over relocation will need to be adjudicated by those with standing to speak for the property interest of the decedents.

10 OHIO REV. CODE ANN. § 517.11 (West 2002).

11 *See* Plat map, N.E. 1/4, Area 14, Parcel No. 7208120, Washington Township, Ohio, Warren County Recorder's Office.

12 *See id.*

13 Deeds of record, Warren County, Ohio Recorder's Office.

14 *See History*, *supra* note 3. According to the Ohio Department of Natural Resources, however, no rattlesnakes are found in this area of Ohio.

15 Interview with Dr. Richard Sams, third-generation descendant of Chloe Cummins, whose grave is in the Olive Branch Cemetery (March 2001).

legal standing to challenge the trustees' performance.[16] As collateral relatives of the third generation past the decedents, Ohio law does not provide them standing[17] and as non-residents of the Township they would find it difficult to prove the requisite nexus of interest to file for mandamus.[18]

Although Ohio law mandates that township trustees maintain such cemeteries,[19] it provides no funding to do so.[20] The Washington Township trustees would have to levy a special tax on their own initiative (which is provided for in the statute to maintain burial grounds),[21] which would certainly guarantee their removal at the next election in this far from affluent rural area.

Like so many thousands of similar sites, the Olive Branch Cemetery and its cargo of pioneer graves continues to sink under the realities of modern society, as the living struggle to find a method of bringing the various interests to a forum of resolution. But of the many types of burial places in America, only one type presents this problem. The next section briefly defines the pioneer cemetery, which is so likely to be neglected or abandoned today.

III. FAMILY, COMMUNITY, AND CHURCHYARD BURIALS IN AMERICA

> *A rustic cemetery . . . where the avarice of the living confines within narrow limits the . . . dead; where the confused medley of graves seems like the wild arrangement of some awful convulsion of the earth.*[22]

Burials in early America took place in four places: by pioneers in isolated, unorganized places on the true frontier; on a family farm, sometimes in a multifamily burying ground; in churchyards, perhaps open to public as well as church members; and for the poor, unknown or criminal, in "potter's fields."[23] Taken together, these sites are the most likely to be neglected, abandoned, or suddenly rediscovered during construction or farming.

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16 *Id.*

17 OHIO REV. CODE ANN. § 517.10 (West 1994).

18 *See infra* notes 100-01 and accompanying text.

19 OHIO REV. CODE ANN. § 517.11 (West 1994).

20 *See* OHIO REV. CODE ANN. § 517.15 (West 1994).

21 OHIO REV. CODE ANN. § 517.19 (West 1994).

22 *A Rustic Cemetary*, 4 LITERARY MAGAZINE AND AMERICAN REGISTER 22, 27 (Aug. 1805).

23 SLOANE, *supra* note 2, at 13-14. The phrase "potter's fields" comes from the passage in *Matthew* 27:7, describing the land of the same name outside the wall of the City of Jerusalem, used in biblical times for the burial of the poor. SLOANE, *supra* note 2, at 24.

Modern writers (and this Comment) tend to speak of these four types of burying grounds under the one phrase "pioneer cemeteries,"[24] although these burials actually concern different types of land and occurred over a 200-year span of time.

A. *Graves of the True "Pioneers"*

The graves of the true American pioneers are often unmarked and solitary, and they can turn up almost anywhere—reflecting the practical problem of needing to bury the dead where they died.[25] Sometimes, these burials were made near or within established Native American burial places,[26] creating some confusion for those attempting to follow the Native American Graves and Relics Repatriation Act.[27]

Because of the extreme circumstances under which these deaths and burials occurred, it was not expected that true pioneer burial sites would be protected or maintained, and in fact they were often left unmarked.[28] These sites have not been the subject of much litigation, except in states like Nebraska, where a public controversy arose over the treatment of the graves of Nebraska's first settlers.[29] This controversy ultimately resulted in the passage of Nebraska's Unmarked Burial Sites and Skeletal Remains Protection Act (Reburial Act),[30] which applies many of the same strict regulations to these graves that are contained in the Native American Act.[31]

B. *Domestic Burying Grounds*

> *Wherever there is a solitary dwelling, there is a domestic burying place, generally fenced with neat white pailings, and deliberately kept, however full the settler's hands may*

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[24] *See* SLOANE, *supra* note 2, at 13-14.

[25] *See* SLOANE, *supra* note 2, at 14.

[26] *See* SLOANE, *supra* note 2, at 14.

[27] 25 U.S.C. § 3001-3013 (1990). While this federal law provides strict procedures for the handling of Native American remains, and prescribes penalties and enforcement schemes, the Act does not apply in any regard to the remains of non-Native Americans. Therefore, the blending of burials at these sites can pose a complicated compliance problem as well as a division in jurisdiction over the remains.

[28] *See* SLOANE, *supra* note 2, at 14.

[29] *See generally* Robert M. Peregroy, *The Legal Basis, Legislative History, and Implementation of Nebraska's Landmark Reburial Legislation*, 24 ARIZ. ST. L. J. 329 (1992).

[30] The Unmarked Human Burial Sites and Skeletal Remains Protection Act, NEB. REV. STAT., §§ 12-1201 to -1212, 28-1301 (Supp. 1990).

[31] Native American Graves Protection and Reparation Act, 25 U.S.C. § 3001 (2001). For an analysis of the issues and processes that culminated in the enactment of Nebraska's Reburial Act, see Peregroy, *supra* note 29.

> *be, and whatever may be the aspect of the abode of the living*.[32]

Harriet Martineau, traveling through the American frontier, saw this next step in the establishment of family burial grounds as "symbols of civilization and domestication."[33] Along with former churchyards, this is one of two types of burying grounds that are most likely to be in dispute today. Family burial grounds often are found on a high part of the land of an original farm, and are often both shaded by trees planted for the purpose and ringed with a fieldstone wall or other enclosure.[34] They are less popular in the New England States, where those settlers continued the European custom of churchyard burial.[35]

Free African Americans in Northern states, as well as those subject to slavery in the South, were interred in separate sections or in completely segregated burial places.[36] In an attempt to protect their fragile family and community ties, they developed and protected these areas as best they could.[37]

Susan Cooper, the daughter of James Fenimore Cooper, said in 1850 that "'small family burying grounds, about the fields, are very common,'" and that "the prevalence of farm burials 'had its origin . . . in the peculiar circumstances of the early population, thinly scattered over a wide country, and separated by distance and bad roads from any place of worship.'"[38]

C. *Burials in the Churchyard*

Churchyard burying grounds in early America were remarkably similar in layout, monuments, and management regardless of religious tradition.[39] Graves were not carefully plotted, and records were not always kept and were certainly not always accurate.[40] The sacredness of the space, which would become the norm in the latter part of the nineteenth century, had not yet developed—and using the space for fairs, markets, and other events was common.[41] Fence and wall enclosures, as well as an increasing

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[32] SLOANE, *supra* note 2, at 14 (quoting HARRIET MARTINEAU, 2 RETROSPECT OF WESTERN TRAVEL 228 (1838)).

[33] *Id.*

[34] *See* SLOANE, *supra* note 2, at 14-15.

[35] *See* SLOANE, *supra* note 2, at 15.

[36] *See* SLOANE, *supra* note 2, at 15-16.

[37] *See* SLOANE, *supra* note 2, at 15.

[38] SLOANE, *supra* note 2, at 17 (citing SUSAN FENIMORE COOPER, RURAL HOURS (1851)).

[39] SLOANE, *supra* note 2, at 20.

[40] SLOANE, *supra* note 2, at 20.

[41] SLOANE, *supra* note 2, at 20.

unwillingness to displace the dead or obliterate the cemetery, itself became more common in the nineteenth century.[42]

D. *Burial of the Poor: The "Potter's Field"*

Few potter's fields existed in America before the nineteenth century, and they were more a feature of cities than rural areas.[43] They were often moved or abandoned, especially after epidemics, and it is rare to be able to identify one of them today.[44] Today, the principal problem of these potter's fields is their inadvertent discovery and exposure during urban construction projects.[45] However, no legal stalemate is created by such a finding, in that all jurisdictions have statutory provisions outlining procedures for the unexpected finding of human remains and their disinterment and eventual reburial.[46]

E. *Modern Perpetual Care Cemeteries*

The rise of the modern cemetery and memorial park began with the establishment of the Mount Auburn Cemetery outside Boston in 1831.[47] With perpetual care provisions such as maintenance trusts, modern recordkeeping, state regulation, and widely agreed-upon expectations and plans, these parcels are not an issue for rural land owners or developers.[48]

The next section reviews the property rights expectations of early decedents, and the willingness of modern courts to uphold those rights. These cases have culminated in a relatively stable scheme of common law and statutory property rights in gravesites in the twenty-first century[49] without, unfortunately, a mechanism for identifying a person with standing to press for their enforcement.

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42 SLOANE, *supra* note 2, at 20.

43 SLOANE, *supra* note 2, at 24.

44 SLOANE, *supra* note 2, at 24.

45 SLOANE, *supra* note 2, at 24.

46 *See, e.g.*, OHIO REV. CODE ANN. §§ 313.08, 313.18 (Anderson 2002) (giving the county coroner authority to disinter, identify, and dispose of human remains wherever found within the jurisdiction).

47 SLOANE, *supra* note 2, at 44.

48 For a discussion of these regulatory schemes, see Bureau of Consumer Protection, Funeral Industry Practices: Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule 101-42 (later codified as 16 C.F.R. § 453) (2003).

49 See *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378 (1961), for an excellent explanation of these modern property rights in cemeteries). *See also* JOHN F. LLEWELLYN, A CEMETERY SHOULD BE FOREVER (Tropico Press, 1999)

III. PROPERTY RIGHTS IN BURIAL SITES

The English common law viewed the burial of a human body as only a temporary appropriation of space, or as an "accession to realty,"[50] rather than as a property interest of its own. Conceptually, this "pseudo-easement" creating only a right of burial yielded up or extinguished as the body decomposed and ceased to occupy the space.[51] This viewpoint, very useful in the practice of recycling limited space in European churchyards, began to subside immediately in the wide-open spaces of the American colonies.[52]

American courts rejected the European view of the impermanence of the gravesite.[53] By 1927, for example, an Iowa court stated that "a due respect for the memory of the dead and for the feelings of the living friends and relatives requires that when a body is once interred it shall so remain unless extreme necessity demands its disinterment."[54]

This view of permanence, and the rise of more organized cemeteries (whether public, religious, or private), gave rise to uniquely American theories of the property rights of decedents in burial grounds.[55] One theory, "dedication," is the idea that the entire community owns the cemetery in some regard, along with the ownership of the decedents.[56] A Washington court recognized the principle of dedication, by which an area of land publicly dedicated and set aside as a cemetery creates a fee interest in the entire public.[57] The idea that the community owns the fee interest is embodied in many state statutes providing for the transfer of abandoned grounds to local officials in trust for the community. [58]

Modern-day litigation can arise from the principle of dedication when a governmental entity claims control of a burying ground and a private

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50 *See generally* PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES, 124-34 (2d. ed. 1950).

51 *Id.*

52 SLOANE, *supra* note 2, at 44.

53 R. F. Martin, Annotation, *Removal and Reinterment of Remains*, 21 A.L.R. 2D 472 (1952).

54 King v. Frame, 216 N.W. 630, 633 (Iowa 1927).

55 Hines v. State, 149 S.W. 1058 (Tenn. 1911).

56 Campbell v. City of Kansas, 13 S.W. 897, 898 (Mo. 1890); Haslerig v. Watson, 54 S.E. 2d 413, 415 (Ga. 1949). For statutory dedication, see Langston City v. Gustin, 127 P. 2d 197, 198 (Okla. 1942). For acquisition by a cemetery corporation, see Memphis State Line R. Co. v. Forest Hill Cemetery Co., 94 S.W. 69, 74 (Tenn. 1906); Whitmore v. Woodlawn Cemetery, 75 N.Y.S. 847, 849 (N.Y. App. Div. 1902).

57 Roundtree v. Hutchinson, 107 P. 345, 346 (Wash. 1910).

58 *E.g.*, OHIO REV. CODE ANN. § 517.20 (Anderson 2002)

individual or family claims ownership.[59] The family will assert that they never "dedicated" the cemetery to the public, in spite of public burials, and as such they still own the fee interest in the land. [60]

A simple fee interest in an individual grave is rarely a recognized theory of decedent property rights. The law generally presumes that an easement exists, even when a document contains words of grant that would normally indicate a fee simple interest. [61]

Instead, the majority American view is that an easement is created.[62]

> When a family burial plot is established, it creates an easement against the fee, and while the naked legal title will pass, it passes subject to the easement created. The easement is in favor of the person creating and establishing the burial plot . . . [or] his heirs. The easement and rights created thereunder survive until the plot is abandoned.[63]

This easement is characterized by many courts as an easement in gross, owned by the heirs of the decedent.[64]

Courts have recognized the ongoing nature of the rights of the heirs of the decedents in cases such as *Heiligman v. Chambers*:

> Where an owner of land has appropriated a small part thereof as a private burying ground, and it has been used as such, the land cannot be conveyed or devised so as to interfere with such use, and he and his grantees, devisees, and heirs hold the title in trust for the benefit of those entitled to burial in it, who also have a right to visit it for the purpose of repairing, beautifying and protecting the graves and grounds, and for these purposes a right of ingress and egress from the nearest public road, to be

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59 Wana the Bear v. Cmty. Constr. Inc., 128 Cal. App. 3d 536, 538 (Cal. Ct. App. 1982).

60 *Id*. at 539 n.7.

61 Whitesell v. City of Montgomery, 355 So. 2d 701, 702 (Ala. 1978).

62 Mingledorff v. Crum, 388 So.2d 632, 633 (Fla. Dist. Ct. App. 1980); Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959); H.D. Warren, Annotation, *Private or Family Cemeteries*, 75 A.L.R. 2D 591 (1961). *Cf.* Gallaher v. Trustees of Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc., 399 A.2d 936, 940 (Md. Ct. Spec. App. 1979) (for different specific terminology); Vidrine v. Vidrine, 225 So.2d 691, 697 (La. Ct. App. 1969); Sanford v. Vinal, 552 N.E.2d 579, 584 (Mass. App. Ct. 1990).

63 *Heiligman*, 338 P.2d at 148.

64 Warren, *supra* note 62, at 591.

> exercised at reasonable times and in a reasonable manner.[65]

Again, this is a viewpoint now incorporated into a number of state statutes.

Other forms of property interests have been theorized by courts, but are very much in the minority. Some courts have used the theory of a covenant, where "[a] dedication is in the nature of an irrevocable covenant running with the land."[66] Some courts have treated the rights of the deceased as *sui generis*, "technically . . . only a privilege or license, but nevertheless a form of special interest" not subject to the laws of ordinary property.[67] This judicial approach may be a throwback to the English common law idea of a "right of sepulture," as discussed in the ecclesiastical case of *Gilbert v. Buzzard* in 1820.[68]

IV. PROPERTY LAW "DEFENSES" AVAILABLE TO DECEDENTS

Modern property law provides decedents with the full range of property law remedies for defending their burial site against others, as if it were a fee interest—remedies such as injunction, trespass, and ejectment.[69]

Defending title to grave sites against those seeking to acquire it by adverse possession has been largely successful. In one case, the owner of surrounding land attempted to assert adverse possession over an unused cemetery.[70] The court held that the cemetery was not abandoned, despite the lack of new interments for seventy-five years, and that the presence of occupied graves precluded the landowner's attempt to assert "exclusive" adverse possession over the cemetery.[71]

In another case, however, the plaintiffs made a successful adverse possession argument on behalf of the already buried decedents against those seeking to bury in the same ground.[72] The court noted:

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65 *Heiligman*, 338 P.2d at 147-48.

66 *Vidrine*, 225 So.2d at 697.

67 Dearinger v. Peery, 387 N.W.2d 367, 372 (Iowa Ct. App. 1986).

68 Gilbert v. Buzzard, 161 Eng. Rep. 1342 (Consistory Ct. 1820). Early English law made a division between the common law jurisdiction over monuments and the Church's jurisdiction over the actual bodies of the deceased. This case identified a completely unique right of the decedent to the occupancy of his or her grave, exclusive of property law.

69 Brunton v. Roberts, 97 S.W.2d 413, 415 (Ky. Ct. App. 1936); England v. Central Pocahontas Coal Co., 104 S.E. 46, 47 (W. Va. 1920); Guy Vernon Slade, Note, *Cemeteries—Nature of Interest of "Owner" of Cemetery Lot—Trespass, Remedies at Law and in Equity*, 15 B.U. L. Rev. 307 (1935).

70 Forest Home Cemetery Ass'n. v. Dardanella Fin. Corp., 329 N.W.2d 885, 889 (S.D. 1983).

71 *Id.*

72 Hook v. Joyce, 22 S.W. 651, 652 (Ky. 1893).

> It seems to us burial of the dead body is the only possession, where claimed and known, necessary to ultimately create complete ownership of the easement . . . . [A]nd as long as it is inclosed as a burial place, or even, without inclosure, as long as gravestones stand marking the place as burial ground, the possession is, from the nature of the case, . . . actual, adverse, and notorious.[73]

V. ABANDONMENT AND STATUTORY REMEDIES

In many states, "abandonment" of a burying ground or cemetery triggers the transfer of the fee interest to a government body, along with the trusteeship of the easements of the decedents as we have discussed.[74] Therefore, the interpretation of abandonment becomes a critical issue for interested parties. Definitions can come either from case law or statutory definitions, or from a combination of case law and statutory definitions.[75]

One definition of abandonment is closely related to the concept of notice. For example, an Oklahoma court noted that "'[a]s long as a cemetery is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves or as long as it is known and recognized by the public as a graveyard, it is not abandoned.'"[76] A court in Georgia, however, required only "sufficient" indicators in the form of monuments: "Under the law, [the burying ground] could not be considered to be abandoned as long as there were tombstones and markers on the graves sufficient to put one on notice that it was a burial ground and cemetery."[77]

Case law becomes important because most states use the word "abandoned" (as well as the word "neglected") in their statutes without

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[73] *Id.*

[74] ALA. CODE § 11-47-66 (1992); CAL. HEALTH & SAFETY CODE § 8700 (West 1970); FLA. STAT. ANN. § 497.345 (West 2002); GA. CODE. ANN. § 36-71-1 (West 2000 & Supp. 2003); 70 ILL. COMP. STAT. 105/8 (West 1993); IOWA CODE ANN. § 317.4 (West 1997); KAN. STAT. ANN. § 15-1015 (2001); MINN. STAT. ANN. § 306.243 (West 1985 & Supp. 2003); MISS. CODE ANN. § 39-5-19 (1972 & Supp. 2003); MO. ANN. STAT. § 214.392 (West 1996 & Supp. 2003); N.Y. GEN. MUN. LAW § 164 (McKinney 1999); N.C. GEN. STAT. § 65-1 (2001); N.D. CENT. CODE § 23-06-30 (2002); OR. REV. STAT. § 226.510 (1997); S.C. CODE ANN. § 27-43-10 (Law. Co-op. 1976 & Supp. 2002); S.D. CODIFIED LAWS § 7-26-7 (Michie 1993); TENN. CODE ANN. § 46-3-114 (2000); TEXAS GOVT. CODE ANN. § 442.017 (Vernon Supp. 2002-2003) (effective Sept. 1, 2001); WASH. REV. CODE ANN. § 68.60.030 (West 1997).

[75] *See* statutes cited *supra* note 74.

[76] Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959) (quoting 10 AM. JUR. § 35).

[77] Adams v. State, 97 S.E.2d 711, 715 (Ga. Ct. App. 1957).

definition.[78] Some states, however, create some definition in their statutory scheme.

Recognizing this problem, the South Carolina legislature created a bright-line test in its statute: "The conveyance of the land upon which the cemetery or burying ground is situated without reservation of the cemetery or burying ground shall be evidence of abandonment for the purposes of this chapter."[79]

Recognizing the difficulty in defining abandonment, some states like Iowa have made the choice to include all cemeteries within the local jurisdiction in their statutes: "This bill strikes all reference to the word abandoned in Code Chapter 31 as the word describes cemeteries which are weed infested."[80]

In contrast, Minnesota has chosen a definition that addresses the specific public concern for early pioneer graves, coupled with a provision for the failure of private cemetery owners. Specifically, the statute provides that

> (1) a cemetery that has been abandoned or neglected and the association having had charge of the cemetery has disbanded or fails to act; or
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> (2) an abandoned or neglected private cemetery containing the remains of pioneers or residents of this state, deceased before 1875 or civil war veterans or veterans of the armed services of the United States of any previous war.[81]

Finally, in keeping closer to the "police power" definition and rationale for local power over property, some states provide an abandonment definition that relies on public health and nuisance theories. Oregon's law provides the following:

> (1) That there exists within municipal corporations of the state, cemeteries which have been abandoned and cemeteries which have deteriorated and become dilapidated and overgrown with weeds, trees, shrubs or other uncontrolled growth.

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78 CONN. GEN STAT. ANN. § 19a-308 (West 2003); 65 ILL. COMP. STAT. ANN. 5/11-50-1 (West 1993); MINN. STAT. ANN. § 306.245 (West 1985); MISS. CODE ANN. § 47-5-452 (2000); PA. STAT. ANN. tit 9, § 15.1 (West 1999).

79 S.C. CODE ANN. § 27-43-40 (Law. Co-op. 1976).

80 IOWA CODE ANN. § 31 (West 2002)

81 MINN. CODE ANN. § 306.243 (West 2002 & Supp. 2003).

> (2) That such cemeteries, by reason of their unsightly appearance, fire hazard, and by reason of their providing a place of concealment conducive to criminal activities and juvenile delinquency, constitute a menace to the health, safety, morals and welfare of the residents of such municipal corporations; and that these conditions necessitate the use of public funds for crime prevention, fire protection, control of juvenile delinquency, accident protection and other public services and facilities.[82]

VI. STATUTORY REMEDIES

The most common statutory remedy for abandoned cemeteries is to pass the fee interest by statute to local authorities such as township trustees or county commissioners, subject to the easement of the decedents and a duty to maintain,[83] except in states like Nebraska or Minnesota.[84]

The requirement to maintain cemeteries is often muddied by statutory language of permission rather than obligation. Ohio's statute, for example, provides that "[t]he board of township trustees shall provide for the protection and preservation of cemeteries under its jurisdiction."[85] These are clearly words of obligation. But later, the same section provides that "the board . . . may recover damages for injuries thereto or any part thereof, or to any fence or hedge enclosing them, or to any tomb or monument therein," and that the board "may enclose such cemeteries with a substantial fence or hedge"; "may re-erect any fallen tombstones"; and "may levy a tax to meet any costs incurred for these purposes."[86]

Another feature in state statutes is a requirement to cooperate with family members in the disposition of abandoned cemeteries, especially in the circumstance when the decedents are to be removed and reburied.[87]

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[82] OR. REV. STAT. § 226.510 (1997). *See also* Masonic Cemetery Ass'n. v. Gamage, 38 F.2d 950, 956-57 (9th Cir. 1930); Seale v. Masonic Cemetery Ass'n, 18 P.2d 667 (Cal. 1933) (validating grave removal under police power).

[83] *See* statutes cited *supra* note 74.

[84] These states have had widespread public debate over the status of pioneer remains, and have adopted solutions markedly similar to the Native American Graves Protection and Repatriation Act.

[85] OHIO REV. CODE ANN. § 517.11 (Anderson 1998).

[86] *Id.*

[87] *E.g.*, OHIO REV. CODE ANN. §§ 517.21, 517.22 (Anderson 1998). Section 517.21 of the Ohio Revised code provides that:

> [t]he board of township trustees . . . may . . . convey any cemetery under their control that they have determined to discontinue as burial grounds, but possession of the cemetery shall not be given to a grantee until after

(*continued*)

However, these statutes use words such as "next of kin" which do not grant standing to present-day collateral relatives of those buried in pioneer cemeteries.[88]

VII. WHY ARE THESE STATUTORY REMEDIES NOT A "TAKING" UNDER THE FIFTH AMENDMENT?

Remedies like the preceding Ohio examples, common in many states, provide for government acquisition of private property interests (both the fee simple of the cemetery land, and possibly the easements of the decedents in trust) without any compensation to the owners. In the case of many of these governmental acquisitions, the argument is that maintenance services constitute "just compensation." This could generally be quickly rebutted by the actual absence of any services provided. Why, then, have these remedies not been successfully challenged under the Takings Clause?

Three factors that inhere in Fifth Amendment jurisprudence weigh against a taking in these cases. First, the "easement" theory of burial rights argues against a "total taking" of the property that is required under the Takings Clause, as the decedents do not own the totality of their grave. Second, burial grounds of this vintage do not represent the "investment backed expectations" discussed by the Court in *Penn Central*[89] that was essential to a finding of a taking, as the acquisition of a personal burial place is not an economic enterprise.

Finally, the Iowa Supreme Court applied the rule from *Lucas v. South Carolina Coastal Council*[90] to a dispute involving a burial site in holding that a taking does not occur for Fifth Amendment purposes if a restriction on economic use already inheres in the title of the land.[91] Under any of the various property theories discussed above, *some* economically significant limitation does run with the title of any burial ground—be it an easement, a covenant, or some unique right of sepulture. [92]

> the remains buried in that cemetery, together with stones and monuments, have been removed.

Before any removal, however, "the board, trustees, or directors shall first give notice to the family, friends, or next of kin of the decedent involved, if known . . . ." OHIO REV. CODE ANN. § 517.21. *See also* Martin, *supra* note 53, at 483-84.

88 *See, e.g.*, OHIO REV. CODE ANN. § 517.21.

89 Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

90 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-32 (1992).

91 Hunziker v. Iowa, 519 N.W.2d 367, 370-71 (Iowa 1994).

92 *See* Iowa Coal Mining Co. v. Monroe County, 494 N.W.2d 664, 670 (Iowa 1993).

VIII. THE PROBLEMS OF STANDING AND COMPETING INTERESTS

Under most statutory schemes, local officials acquire the fee simple interest in the land constituting the cemetery, and they also acquire the easement of the deceased in trust. This logical conclusion follows the fact that the trustees can indeed "trade" the easement of the deceased for a similar easement elsewhere (reinterment) under the statutorily defined circumstances. Therefore, they do have some constructive control over the easements of the deceased in addition to the fee interest.

The ownership of multiple interests by one receiver creates one of the tensions that are at the heart of the stalemate over these cemeteries. Acting as elected representatives of the community, trustees are called upon to satisfy diametrically opposed viewpoints. One group has an economic interest in development of the land without hindrance. Another group is adverse to additional taxation for the maintenance of cemeteries containing distantly or not related long-dead persons. There are others that favor historic preservation and resistance to urban sprawl.

Set against these competing tensions is a fiduciary duty to act in the best interest of the deceased as receivers of their property rights–arguably, to exactly fulfill their original expectations of perpetual interment in that place with perpetual care of the site.

Most state statutes create an unfunded mandate to maintain these sites or, alternatively, to relocate the bodies and the monuments at township expense to a maintained cemetery.[93] However, most of these burial grounds exist in local jurisdictions without a growing tax base to support growth in essential services, let alone added responsibilities.[94] In states that *do* provide for some funding source, many follow the deficient Ohio model which *allows* the local officials to levy a tax for the purpose upon their own initiative.[95] Although this system is technically not "unfunded," it is politically fatal for the officials who actually do levy the tax given all the above-mentioned competing interests.

It would not be uncommon for a single local jurisdiction to become responsible for twenty or more of these sites.[96] At an average yearly cost of $2500.00 for the most basic maintenance by unskilled persons,[97] this quickly becomes a major budget item for small rural townships. If exhumation and relocation is attempted, the average cost for a 25-grave site can be well in excess of $200,000.00.[98]

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93 *See* statutes cited *supra* note 74.

94 *See* SLOANE, *supra* note 2, at 238-40.

95 OHIO REV. CODE ANN. § 517.11 (Anderson 1998).

96 LLEWELLYN, *supra* note 49, at 243-61.

97 *Id.*

98 *Id.*

A statutory (but unfunded) remedy of a quarter of a million dollars is well beyond the reach of local officials and places a huge burden on the future economic development of the site.

Outside the scope of this article, but nonetheless a consideration, are the very practical problems that local officials have in dealing with accessing and maintaining these sites. For example, mowing cemeteries created in irregular patterns and the lack of local expertise in the maintenance of cemetery monuments and the options for exhumation and relocation are but two of the unique problems that add to the expense of these sites.[99]

It is no wonder, then, that these competing interests and pressures lead to a stalemate over most of these sites, where the only reasonable thing to do about the problem is to wait and hope.

For interested parties wishing to break this stalemate, mandamus or other methods to compel action regarding the parcel are often unavailable because few interested parties have or can gain standing to bring suit. First, most relatives of the decedents live far from the township or are now unknown due to the passage of time, so even if they could gain standing, they would likely never have notice. Second, state statutes may actually specify a relatively close degree of kinship before a party is allowed to intervene in decisions.[100] This precludes any modern relatives from representing the interests of these eighteenth and nineteenth century decedents. Third, interested parties often must be domiciled in the political jurisdiction that has custody of the parcel in order for a judge to allow them standing to bring action for an order of mandamus.[101]

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[99] SLOANE, *supra* note 2, at 238-40.

[100] Walker v. Konitzer, 31 Cal. Rptr. 906 (Cal. Ct. App. 1963); Friedman v. Agudath Achim North Shore Congregation, 115 N.E.2d 553 (Ill. App. Ct. 1953); Radomer Russ-Pol Unterstitzung Verein of Baltimore City v. Posner, 4 A.2d 743, 746 (Md. 1939); Tsaraclis v. Characklis, 3 A.2d 725 (Md. 1939); Sheffield Farms Co. v. McDonough, 126 A.2d 886 (N.J. 1956); Renga v. Spadone, 159 A.2d 142 (N.J. Super. Ct. Ch. Div. 1960); Friant v. Dolbow, 124 A.2d 12 (N.J. Super. Ct. Ch. Div. 1956); Perth Amboy Gas Light Co. v. Kilek, 141 A.2d 142; *In re* Hilliard, 91 N.Y.S.2d 547 (N.Y. Gen. Term 1944); Silvia v. Helger, 67 A.2d 27 (R.I. 1949); Fowlkes v. Fowlkes, 133 S.W.2d 241 (Tex. Civ. App. 1939); Sherrard v. Henry, 106 S.E. 705 (Md. 1939).

[101] C-Y Development Co. v. City of Redlands, 137 Cal. App. 3d 926, 187 Cal. Rptr. 370 (Cal. Ct. App. 1982); Warden v. Byrne, 430 N.E.2d 126 (Ill. App. Ct. 1981); Beauchamp v. Cahill, 180 S.W.2d 423 (Ky. Ct. App. 1944); Friends of Animals & Their Environment (FATE) v. Nichols, 350 N.W.2d 489 (Minn. Ct. App. 1984); State *ex rel*. Kinneard v. Jackson County Court, 17 S.W.2d 572 (Mo. Ct. App. 1929); *In re* Dental Soc. of State v. Carey, 462 N.E.2d 362 (N.Y. 1984); Board of Comm'rs of McIntosh County v. Kirby, 49 P.2d 746 (Okla. 1935); Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796 (Utah, 1986). *Sufficient legal interest in action not demonstrated:* Thomasson v. (*continued*)

In the absence of standing, an appeal to the political process of the township or county, media pressure, or even offers of private funding for maintenance can be made by parties. But these often fail for lack of interest, on economic or political grounds, or because of the perception of "meddling" by outsiders in local affairs.

Standing has been lost through abandonment, in some courts:

> The mere passage of time does not extinguish the rights of descendants in a family burial ground; but where the family has ceased to visit the cemetery and where they have so long neglected to care for it that the ground is no longer recognizable as a cemetery, the family burial ground has been abandoned, and with it the private standing of the descendants to require that those who own the land abstain from using the land for other purposes.[102]

Without someone with standing to enforce the rights of these decedents, it is easy to see how the stalemate over the future of pioneer cemeteries has developed. For our political and judicial systems of dispute resolution to work, all viewpoints must have an advocate. For those long dead, as with the living that are unable to assert their legitimate rights for other reasons, our legal system uses receivership as a proper solution.

Jones, 157 P.2d 655 (Cal. Dist. Ct. App. 1945); Kelly v. Dearington, 583 A.2d 937 (Conn. App. Ct. 1990); State *ex rel*. Hanna v. Lee, 169 So. 220 (Fla. 1936); People *ex rel*. Miller v. Fullenwider, 160 N.E. 175 (Ill. 1928); Drennan v. Central Nat. Fire Ins. Co., 205 N.W. 735 (Iowa 1925); Villages of Greenbriar v. Hutchison, 880 S.W.2d 777 (Tex. App. 1993). *Sufficient personal nexus to action not demonstrated:* U.S. *ex rel*. New York Warehouse, Wharf & Terminal Ass'n v. Dern, 68 F.2d 773 (D.C. Cir. 1934); Kelly v. Dearington, 583 A.2d 937 (Conn. App. Ct. 1990). *Insufficient connection between injury and relief sought:* County of San Diego v. State, 931 P.2d 312 (Cal. 1997); Madera Cmty. Hosp. v. County of Madera, 201 Cal. Rptr. 768 (Cal. Ct. App. 1984); Retail Liquor Dealers Protective Ass'n of Illinois v. Schreiber, 47 N.E.2d 462 (Ill. 1943); Hancock County v. State Highway Commission, 193 So. 808 (Miss. 1940). State *ex rel.* Twenty-Second Judicial Circuit v. Jones, 823 S.W.2d 471 (Mo. 1992).

[102] Sanford v. Vinal, 552 N.E.2d 579, 585-86 (Mass. Ct. App. 1990). *See also* Mayes v. Simons, 8 S.E.2d 73 (Ga. 1940); Touro Synagogue v. Goodwill Indus. of New Orleans Area, Inc., 96 So.2d 29 (La. 1957); Tracy v. Bittle, 112 S.W. 45 (Mo. 1908).

IX. RESOLVING THE PROBLEMS OF ABANDONED CEMETERIES: CREATION OF AN ADVOCATE, FUNDING A SOLUTION

A. *Creating an Advocate by Receivership*

In order to create the adversarial impetus for the resolution of issues regarding these sites,[103] the fee interest in the land should be separated from the easement interest of the decedents. This action would break the stalemate created by such diverse interests being statutorily vested in one body.

As is common in current statutes, the fee interest would continue to go by statute to the trustees of the township or county where the burial ground is located. The trustees would represent the economic and practical interests of the modern community in the use of the land. Although they would still have the difficulty of dealing with competing community ideas about land use, preservation, and economic development, this would be no greater burden than they accepted upon election.

Upon transfer of the fee of an abandoned cemetery, the probate or common pleas court of the jurisdiction would appoint a receiver for the easement interests of the decedents[104]—their interest in a perpetual interment site with proper care and access. This receiver could be chosen by the court in a number of ways: paid, as other receivers, or volunteer, from community groups such as religious coalitions or historical societies.

One practical effect of this arrangement (with or without new funding sources) is to provide a method for the communities to begin to resolve these problems through the adversarial method that works best for all problems. The fiduciary actions of the receiver will force this issue in front of the public without blame to the elected trustees, where a solution can begin to be debated or the assistance of state lawmakers sought.

A receiver can file mandamus actions to compel the trustees to maintain burying grounds in their control, activate statutorily provided levies, reallocate funds, or take other actions reasonable to the preservation of the decedents' interests. They can assist distant relatives and other interested parties by providing a pathway for their input into the process. Receivers can act for the interests of the decedents during negotiations

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[103] Chambers v. Blickle Ford Sales, Inc., 313 F.2d 252 (2d Cir. 1963); Hillman v. Stults, 70 Cal. Rptr. 295 (Cal. Ct. App. 1968); Ebon Foundation v. Oatman, 498 S.E.2d 728 (Ga. 1998); Cmty. Renewal Found., Inc. v. Chicago Title & Trust Co., 255 N.E.2d 908 (Ill. 1970); Goll v. Kahler, 422 S.W.2d 359 (Mo. Ct. App. 1967); Parr v. First State Bank of San Diego, 507 S.W.2d 579 (Tex. Civ. App. 1974)

[104] Warner v. Warner, 228 S.E.2d 848 (Ga. 1976); Shingler v. Shingler, 192 S.E. 824 (Ga. 1937); State *ex rel*. Hampe v. Ittner, 263 S.W. 158 (Mo. 1924); State *ex rel*. Swayze v. Dist. Court of Fifth Judicial District, 258 P.2d 377 (1953); Aaronson v. Shefman, 317 S.W.2d 235 (Tex. Civ. App 1958).

over the sale of cemetery lands, achieving respectful relocation and monument preservation while leaving county or township officials free to represent community use and economic interests. This gives land developers an adversarial mechanism to move decisions along more quickly, whatever the ultimate outcome.

Finally, receivers can act as trustees and managers of private funds and charitable organizations that can be created to achieve preservation or relocation goals in the absence of government funding for such efforts.

Such a scheme would possibly have prevented the actual harm as well as the litigation in the Ohio case of *State v. Glass*.[105] In that case, the defendant was a real estate developer who had purchased a tract of approximately sixty acres in Huntington Township on which there were four graves.[106] The defendant "secured a health permit" to move the bodies, "employed a licensed undertaker to move the bodies to another cemetery," and "paid for moving the stones."[107] She attempted to secure approval of the Huntington Township Trustees, but failed to secure their action.[108] After she ordered the land bulldozed, the trustees charged her with graverobbing under an old Ohio statute, arguably because of the heated confrontations over the situation.[109]

In *Glass*, the lack of a regular, prescribed adversary process made it unlikely that permits, agreements, or any reasonable resolution could ever be achieved. Appointing a trustee or receiver for each of the competing rights might have avoided this litigation, and would have better preserved the interests of the parties. This is a case where the need for reasoned resolution of a political or viewpoint difference was more important than a resolution of economic concerns, but a receivership system would work equally well for either or both.

B. *Funding a Solution*

Coupling a state-level funding scheme with court appointed receivers and the receipt of fee interests by local trustees would further assist in solving the problem of abandoned cemeteries, by providing both receivers and trustees with needed funding to carry out the statutory mandates and fulfill the reasonable expectations of the decedents.

Although the State of Wisconsin failed to enact its plan, it defined a model for possible funding schemes in support of a solution. The proposal

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105 273 N.E. 2d. 893 (Ohio Ct. App. 1971).

106 *Id.* at 895. The graves themselves were excepted from the operation of her deed. "Exception" is "[t]he retention of an existing right or interest, by and for the grantor, in real property being granted to another." BLACK'S LAW DICTIONARY 584 (7th ed. 1999).

107 *Glass*, 273 N.E.2d at 895.

108 *Id.*

109 *Id.*

called for placing most of Wisconsin's 9,000 burial grounds under state regulation, and requiring them to set aside fifteen percent of any burial sale in a fund for future maintenance.[110] On our topic, the plan called for switching "the mandatory maintenance of abandoned cemeteries to court-ordered trustees."[111] Under this plan, such maintenance would have been funded by a $10.00 filing fee on all death certificates issued in the state.[112]

Unlike many state-funded problems, the problem of abandoned pioneer cemeteries has a bounded scope. Modern perpetual care cemeteries, through mandated endowments, will not devolve into neglect. Once the property rights of these pioneer decedents have been assured, the tax scheme itself can be laid to an honorable rest.

X. CONCLUSION

The courts of the American states have recognized the special nature of the burial place both in law and in memory, and have agreed in the majority that the rights of the departed, if not their memory, linger on.

Legislatures have encoded what has been called "a 'right' of the dead and a charge on the quick"[113] in generally recognizing the responsibility of society to protect those rights by maintaining or relocating pioneer graves. Some legislatures have gone further, giving human burial sites from all ages, races, and creeds a further protection—a viewpoint that will undoubtedly continue to be pressed by those citizens to whom the past speaks in louder voice.

The "problem" of these burying grounds will certainly be solved—either by the decaying hand of time and inaction, or by the reasoned and deliberate action of all involved. Some of the pioneer Americans buried in these places, entranced as they were by the promise of expansion and modernity, might well agree to the removal of their remains for the sake of their Nation's progress—others, lovers of the peaceful stillness of their rural resting place, might object. But certainly all would recognize the uniquely American process of solving problems through a combination of discussion and debate, legislative and judicial action, brought about by an even-handed adversarial presentation of the competing solutions. It is that process—in which the rights of these deceased citizens and the rights of the modern community in all its diversity both have standing to seek an answer—that this Comment advocates.

C. ALLEN SHAFFER

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110 Sarah Wyatt, *Some State Cemeteries Slowly Decay*, MILWAUKEE JOURNAL SENTINEL, Sept. 24, 2001, at B3.

111 *Id.*

112 *Id.*

113 Martin, *supra* note 53, at 476.