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Honoring Our Silent Neighbors to the South: The Problem of Abandoned or Forgotten Asylum Cemeteries

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HONORING OUR SILENT NEIGHBORS TO THE SOUTH: THE PROBLEM OF ABANDONED OR FORGOTTEN ASYLUM CEMETERIES

*Louise Harmon**



Touro Law Center is located on the south shore of Long Island, in Central Islip, almost fifty miles east of New York City. The law school is strategically situated across the street from a large federal and state court complex. Our affiliation with the courts is Touro's academic claim to fame, and the curriculum is designed to allow our students to participate in the on-going judicial process across the street. We are proud of our legal neighbors. Their proximity, and our involvement with the courts, are featured in glossy brochures and

promotional materials.¹ The court complex lies to the west of the law school;² to the north is a grassy field and a defunct cheese warehouse;³ to the east a working class community of single-family homes; and to the south, our silent neighbors to the south—the subject of this essay.

Touro Law Center, as well as the courts and the defunct cheese warehouse, was built on the site of the former Central Islip State Hospital, a mental institution in operation from 1889 to 1998.⁴ On the other side of the law school's south parking lot, obscured from view by a tangle of brush, is the cemetery for the hospital's former patients, as well as for some of the former patients from the other two nearby "farm colon[ies]"⁵ state psychiatric hospitals, Kings Park and Pilgrim State. Seen from behind the locked, rusting chain-link fence that

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¹ See *History*, TOURO L. CTR., <http://www.tourolaw.edu/AboutTouroLaw/?pageid=43> (last visited Nov. 13, 2018) ("Touro Law Center moved to its Central Islip location in 2007, adjacent to and working with a federal courthouse and a state courthouse. It is the first law campus of its kind in the country, and our curriculum not only addresses all aspects of law in today's changing world, but capitalizes on the proximity of the courthouses. In addition, our 185,000-square-foot building is a state-of-the-art facility with enhanced technology, classrooms, study spaces and more.").

² *About Touro Law*, TOURO L. CTR., <http://www.tourolaw.edu/AboutTouroLaw/> (last visited Nov. 13, 2018).

³ See Abby Ellin, *Endpaper; Lunch is Served*, N.Y. TIMES (Aug. 1, 2004), <http://www.nytimes.com/2004/08/01/education/endpaper-lunch-is-served.html> (showing that the state took over the property from the Central Islip State Hospital and used it to store donated food, primarily cheese, for later distribution to school lunch programs).

⁴ John Leita, *Central Islip State Hospital*, LONG ISLAND RUINS & REMAINS (July 28, 2009), http://li-ruins.com/index.php?option=com_content&task=view&id=110. There are a variety of terms that have been used from the nineteenth century to the present day to describe these institutions: "Lunatic Hospital; Lunatic Asylum; Asylum for the Insane; Insane Asylum; State Hospital; Mental Health Center; Psychiatric Hospital; Regional Center; Retreat; Developmental Center; Center; Sanatorium." *Historic Asylums Message Board*, ROOTSWEB, <http://www.rootsweb.ancestry.com/~asylums/mainpage.html> (last visited Nov. 13, 2018). This essay may on occasion use historical terms that are not presently deemed appropriate to describe the relevant populations.

⁵ See LEO POLASKI, *THE FARM COLONIES: CARING FOR NEW YORK CITY'S MENTALLY ILL IN LONG ISLAND'S STATE HOSPITALS: KINGS PARK, CENTRAL ISLIP, PILGRIM, EDGEWOOD: A PICTORIAL HISTORY WITH OVER 250 ILLUSTRATIONS* 6 (2003) (defining the farm colonies as buildings constructed in the 1800s to take care of the poor and mentally ill, which consisted of "an almshouse, hospital, nursery and lunatic asylum[] adjoin[ed] . . . [by] a . . . farm where paupers and the insane grew food").

encloses the property, the cemetery looks like a vast park, with a tree-lined central corridor, flanked by two uninterrupted, undulating greens. A weather-ravaged obelisk in the middle is the only visual cue that this was a cemetery. Our trespasser who entered through a hole in the fence—the only way to get in—would notice that the greens undulate in a gridded pattern; his feet would let him know that the ground is studded with row after row of flat, concrete stones, marked only with consecutive numbers. Even then, our trespasser would have to work hard to see them, so many are overgrown with grass. On the eastern edge of the site is an area enclosed by a rusty wrought-iron fence, with a broken gate bearing a Star of David, covered with vines and missing its hinges, delineating an area exclusively for the graves of Jewish residents.

It is sobering to learn that while the law school's neighbors to the east and west are all actively involved in life, judicial and otherwise, the neighbors to the south are far more numerous, and actively involved in nothing. Aside from a ripped mattress, ashes from a nocturnal fire, and some empty beer and wine bottles—the remains of revelry by local youth—there are no signs of life. The wind murmurs through the shuddering pines that shelter the graves, and in the distant background hums the traffic of the Southern State Parkway, with its energy of cars and people on the go. No one in this green, abandoned place is on the go. The sheer numbers of dead are impressive: over 5,000 former patients are buried in this cemetery, located just several feet south of the law school's parking lot. So many unnamed souls beneath our trespasser's feet.⁶

It was the Director of Touro Law Center's Jewish Law Institute, Sam Levine, who first took an interest in the Jewish portion of the former hospital cemetery.⁷ While daydreaming one day from

⁶ *The Central Islip Cemetery Restoration Project*, TOURO L. CTR., <http://law.touro.edu/JewishLawInstitute/?pageid=729> (last visited Nov. 13, 2018). There are also a variety of terms to refer to those bodies that are buried in the ground—the dead. “The terms ‘body’ and ‘dead body’ are generally used to describe the bodily remains, although ‘corpse,’ ‘cadaver,’ ‘decedent,’ ‘deceased party,’ or simply ‘the deceased’ are also used at times.” RONALD G.E. SMITH, *THE DEATH CARE INDUSTRIES IN THE UNITED STATES* 7 (1996). Again, this essay may use a number of these terms.

⁷ I would be remiss not to mention that one of our former law librarians, James G. Durham, was the first to mention to anyone in the law school in 2007 his suspicion that there were many people buried on the other side of our parking lot. His assumption was that the cemetery was a potter's field, and suggested that the law students organize a project to clean up the cemetery, an idea that never came to fruition. At that time, no one at the law school was aware of cemetery's history, nor of its scope.

our Jewish Law Collection on the third floor of the library, Sam had an aerial view of the cemetery and the obelisk. It led him to ponder: if there are truly Jewish dead buried next to the law school, perhaps the Jewish Law Institute ought to take stewardship of those graves. He approached our then Dean, Larry Raful, who was enthusiastic about the project. We were also soon joined in the project by Andrew E. Schultz, the Executive Director of the Community Association for Jewish At-Risk Cemeteries (“CAJAC”).⁸ CAJAC is “dedicated to the ideal of *hesed shel emet*,” or faithful benevolence, a “Jewish designation for kindness toward the deceased who are unable to make claims or offer thanks.”⁹ After a meeting with CAJAC and the officials from the New York State Office of Mental Health, the agency that now maintains the state-owned cemetery, we began to make plans for the restoration of the Jewish portion, and possibly for the creation of a park for the rest of the cemetery. Our then-new Dean, Patricia Salkin, with her expertise in land use planning, embraced the project with characteristic zeal, and in early 2013, Touro Law Center, CAJAC, and the New York State Office of Mental Health entered into a Memorandum of Understanding to get the project underway.

During one of our many trespasses into the cemetery,¹⁰ we discovered the separate sign bearing Hebrew lettering, the date 1980 and the name of Rabbi Melvyn Lerer. A little research revealed that more than 30 years later, Rabbi Lerer was still very much alive. Now over eighty years old, Rabbi Lerer has for years taken care of the few remaining Jewish patients at Pilgrim State, the only one of the original three farm colony hospitals that remains open, and had been responsible for the Jewish patients at the Central Islip State Hospital from 1976 until the hospital closed in 1998.¹¹ During the summer of

⁸ See Andrew E. Schultz, *Why Jewish Cemeteries*, CAJAC, <http://www.cajac.us/read-cajacs-recent-op-ed/> (last visited Jan. 19, 2018) (explaining CAJAC’s interest in the Jewish cemeteries). See also *About The Community Association for Jewish At-Risk Cemeteries* (“CAJAC”), CAJAC, <https://myemail.constantcontact.com/Volunteer-Opportunities-with-CAJAC.html?soid=1103852260119&aid=r7UYgcqrCJE> (last visited Nov. 13, 2018) (stating it was incorporated in 2007 and that CAJAC is concerned with the reclamation of “orphaned cemeteries primarily within the Jewish communities of Metropolitan New York”).

⁹ *About The Community Association for Jewish At-Risk Cemeteries*, *supra* note 8.

¹⁰ The Dean was *not* pleased to have professors and the Director of the Jewish Law Institute wearing boots, and wielding weed cutters, go through a hole in the fence to get into the cemetery, but during the first phases of the project we had no alternative. The New York State Office of Mental Health, however, has since given us the key to the cemetery’s locked gate, so as of May 2012, we are no longer trespassers.

¹¹ Rachel Ginsberg, *The Rabbi for the Mentally Ill*, VOZ IZ NEIAS (Oct. 2, 2011), <http://www.vosizneias.com/92354/2011/10/02/new-york-ny-the-rabbi-for-the-mentally-ill/>;

2011, Rabbi Lerer agreed to come to the law school for an interview about his remarkable efforts on behalf of his Jewish patients, even in death. He told us about how he had coordinated with several Jewish funeral homes over the years to ensure that his patients received pro bono religiously correct funeral services.¹² Rabbi Lerer also continues to organize services during the Jewish holidays for those buried in the cemetery; *Kaddish*, the mourner's prayer, is said "in unison for those people who are interred on the grounds of Central Islip . . . so even though these people are gone, they are not forgotten. We visit them at least once a year."¹³ Rabbi Lerer feels strongly about his former patients:

The majority of these people, especially when I started out at Central Islip, were a geriatric population. Most of them had outlived their families, and were totally bereft of kith and kin. Some of them had been abandoned by their families who wanted nothing to do with them because they were embarrassed by having a

see also Rabbi Moshe Lerer: Jewish Chaplain, Pilgrim State Psychiatric Hospital, Brentwood, NY, RABBINICAL COUNCIL AM. (Mar. 20, 2014), <http://www.rabbis.org/news/article.cfm?id=100867>.

¹² Ginsberg, *supra* note 11. Jewish death practices are quite specific. When a death occurs, the *Chevrá Kadisha* ("Hebrew for 'holy society'") volunteers see to it that the bodies of Jews are prepared for burial according to Jewish tradition and are protected from desecration. The body is prepared for burial with a ritual bath known as the *Taharah*. SHARON DEBARTOLO CARMACK, YOUR GUIDE TO CEMETERY RESEARCH 183-84 (2002). "Ideally, bodies should be interred within twenty-four hours . . ." MARILYN YALOM, THE AMERICAN RESTING PLACE: FOUR HUNDRED YEARS OF HISTORY THROUGH OUR CEMETERIES AND BURIAL GROUNDS 32 (2008). "[T]he immediate members of an Orthodox family . . . tear a piece of their clothes to symbolize their loss" during the "Jewish postburial rite . . . of sitting *shiva* for seven days." *Id.* at 33 (emphasis added). In Reform Jewish tradition, the period of *Shiva* has been shortened to three days, and women are also allowed to help constitute a *minyan* (a minimum group of ten required for prayer) for the recitation of the memorial prayers. *Id.* at 33-34 (emphasis added). "During [*Shiva*], the family stays at home [and] wait[s] for relatives and friends to . . . pay their respects[.]; [m]irrors . . . are covered," and "there should be no concern for personal appearance or comfort": "men are not supposed to shave, and women are not supposed to wear makeup[.] . . . and the immediate family sits on boxes or stools, rather than furniture." CARMACK, *supra*, at 184. The coffin is made entirely of wood, since any other material would impede the body's return to the earth; in order for the "natural process of decomposition [to take place], traditional Jewish laws" also prohibit embalming. YALOM, *supra*, at 32. At the funeral home, a rabbi will lead the congregation in prayers which continue at the gravesite, concluding with the *Kaddish* (the traditional prayer for the dead), which will be recited by the family each day for one year; family members and friends help shovel soil on the grave. *Id.* at 33. When Jews visit graves, they put "rocks or pebbles on top of [the] headstones . . . as a sign of respect and as a sign that family and friends visited." CARMACK, *supra*, at 185.

¹³ DVD: Oral History of Rabbi Melvyn Lerer (Touro Information Technology Center 2011) (on file at the Jewish Law Institute, Touro Law Center).

family member in a psychiatric facility . . . I had to see to it that they are given a dignified, correct kosher funeral as anyone else gets.¹⁴

Particularly distressing to Rabbi Lerer were the numbers on the stone markers:

I wanted to have monuments or name plaques for those people interred there so we could identify the people in case a family member comes—who is buried there. At first I was told of the anonymity of the people who died in a psychiatric facility, how we can't put names on them, or monuments or plaques. So I spoke to the director and said that it was bad enough that the person had a meaningless 30 or 40 or 50 years. The only asset he had left is his name, and how could we deprive him of that? Besides, sometimes family wanted to come out and visit a grave, and we can't find the graves.¹⁵

Some of the Jewish patients at Central Islip State Hospital were also holocaust survivors; for their families, the use of numbers in lieu of names had even darker connotations. Rabbi Lerer raised money in the Jewish community to ensure that the 101 Jewish patients who he had buried from the early 1980s until 1998 were given memorial stones, bearing their names, a Hebrew inscription, and the date of their deaths. This distinguishes these 101 graves from virtually all of the other 5,000 graves in the cemetery. Only numbers commemorate those unknown dead—invisible in life, confined for years in a state mental institution, and now in death—unnamed. There is no residue of identity.

¹⁴ *Id.*

¹⁵ *Id.* Other advocates for memorializing the dead in asylum cemeteries have been dismayed at the use of numbers to identify former patients, instead of names. For example, in 2007, a campaign in Rockland County, NY sparked the installment of a plaque memorializing former patients of Letchworth Village, a now abandoned state-run asylum. *Old Letchworth Village Cemetery*, ATLAS OBSCURA, <https://www.atlasobscura.com/places/old-leitchworth-village-cemetery> (last visited Nov. 17, 2018). Letchworth Village, founded in 1911, was a state institution “for those with any number of what were considered mental disorders at the time.” Scout, *A Mental Asylum Cemetery Hidden in the Woods*, SCOUTING N.Y. (Nov. 10, 2014), <http://www.scoutingny.com/a-mental-asylum-cemetery-hidden-in-the-woods/>. However, “significant overcrowding and widespread mistreatment made this a less than ideal community, and things only worsened as the years passed on.” *Id.* The institution is now in a state of abandonment; the institution’s cemetery contains over 900 numbered markers. *Id.* In 2007, a grassroots campaign led to the installment of a memorial plaque at the cemetery memorializing the over 900 patients; however, we may never know which grave numbers correspond to which names. *Old Letchworth Village Cemetery*, *supra*.

Touro's Jewish Law Institute and CAJAC finally decided to confine the first stage of the project to the restoration of the Jewish portion of the cemetery. This limited scope is consistent with our respective missions, and makes the project manageable. Neither organization has the resources to take on the restoration of over 5,000 graves. Confining the project to the Jewish cemetery has not been a comfortable moral decision, however. We have all found it difficult to ignore those other 5,000 silent dead neighbors who rest in anonymity just feet away from our south parking lot. It is our hope that the project to restore the Jewish graves will stimulate community interest in the rest of the cemetery. Our ultimate goal would be to open up the cemetery to the public and make it into a reflection park—the Central Islip State Hospital Memorial Park. But for now, our project will focus on the Jewish dead who lie within the rusty wrought-iron fence, behind the broken gate that bears the Star of David.

What is this essay about? It serves as the historical and philosophical companion to our project of restoring the Jewish portion of the Central Islip State Hospital cemetery. Part I will put the Long Island farm colonies into historical perspective, seeking to explain how and why these nineteenth century asylums came into being. Who *were* the people interred in the Central Islip State Hospital cemetery, those 5,000 unnamed souls, our silent neighbors to the south? Part II will do the same for the cemetery itself—put it into historical perspective. Where does the Central Islip State Hospital cemetery fit into the tradition of American cemeteries, and more importantly, how does it differ from, if at all, equivalent burial places of its historical period? This latter question is of significance and leads to the more speculative discussion in Part III. Who are the stakeholders in any cemetery and how are they affected when a cemetery becomes forgotten or abandoned?

The discussion in Part III will inevitably raise general questions about our duties to the dead, but as we gaze upon the open fields of the Central Islip State Hospital Cemetery, we are forced to ask: what are our moral obligations to *these* particular deceased people, the former patients of state psychiatric hospitals? In some ways, due to its history of absorbing the mentally ill of New York City, these questions are of pressing concern to Long Island. But we are not alone. Across the country, as many as 300,000 former mental patients are buried in unmarked graves in both active and former state psychiatric

hospitals.¹⁶ Other trespassers are also climbing over or under rusty fences, gazing at their own open fields on the grounds of old asylums, stubbing their toes on what appears to be a grass-covered, numbered, concrete marker, suddenly realizing there is a vast grid of anonymous graves, and wondering what to do.

And they *are* unlike other cemeteries. More than likely, the remains of former mental patients are located in an abandoned or forgotten asylum cemetery that their families, and members of the public, have no access to. It often takes a highly protected key to unlock the chain-link fences that enclose these burial grounds, or an act of criminal trespass. No one may visit these graves, and even if the cemetery were accessible, how would anyone find a specific grave, given the lack of names? The graves of these former mental patients are not only locked up, and mostly covered with grass, but they also bear no marker of identity. No one carved any words in stone to give testament to the person beneath the ground. The circumstances surrounding the asylum cemeteries are different from the burial places of those who lived outside the walls of the asylum. This disparity of treatment in death echoes a disparity of treatment during their lifetimes, a treatment that was not above moral reproach. These are truly the graves of forgotten people—in death, as well as in life. We may well owe them an additional gesture of respect.

But for now, let us turn our attention to the history of the Long Island farm colonies and state psychiatric hospitals, and to the rise of the asylum in the late eighteenth and nineteenth centuries.

¹⁶ Recently, as many as 7,000 coffins were discovered on a 10-acre patch of undeveloped land on the campus of the University of Mississippi Medical Center in Jackson during the construction of a new parking garage. It turns out that part of the campus sits on what was once known as the Mississippi State Lunatic Asylum, in operation from 1855 to 1935. The State of Mississippi is trying to decide how to deal with the remains, citing a cost of \$4 million to exhume the remains and catalog them. Ian Shapira, *Exhuming a Dark Past: Mississippi State Lunatic Asylum's 7,000 Coffins*, WASH. POST (May 9, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/05/09/exhuming-a-dark-past-mississippi-state-lunatic-asylums-7000-buried-coffins/?utm_term=.8ed951334455. A community group in Outagamie, Wisconsin is working to create a memorial for the 133 people who died while patients at the Outagamie County Asylum for the Chronic Insane. *Insane Asylum Cemetery: Forgotten Stories*, POST CRESCENT (Aug. 14, 2014), <https://www.postcrescent.com/story/news/local/2014/08/14/insane-asylum-cemetery-forgotten-stories/14070183/>. In 2015, 200 people gathered to dedicate a granite memorial stone which engraved all the names of those buried in the cemetery, and all 133 names were read aloud. Jim Collar, *Respects Finally Paid at Former Asylum's Cemetery*, USA TODAY (Sept. 25, 2015), <https://www.usatoday.com/story/news/nation/2015/09/25/former-asylum-cemetery-wisconsin/72795880/>. See also discussion of Saint Elizabeth's cemetery *infra* note 330.

I. HISTORICAL BACKGROUND OF THE LONG ISLAND “FARM COLONY” STATE HOSPITALS

In Europe, before the development of the asylum, the mentally ill were taken care of in the home.¹⁷ In our own country during the early colonial period and the early years of the Republic, the family and the community took responsibility for those suffering from insanity.¹⁸ A number of societal factors, however, led Americans to increasingly resort to institutions for the care of the mentally ill: rapid growth in population; urbanization; immigration; and high rates of geographical mobility.¹⁹ The mental asylum, along with its cohorts, “the almshouse, poor farm, and house of refuge, became the institutional solution by which American society fulfilled its obligations toward[s] dependent persons incapable of surviving by themselves.”²⁰ The same phenomenon had taken place in Europe; most asylums in the late eighteenth century were private institutions, “operating for profit within the market economy in what was frankly termed the ‘trade in lunacy.’”²¹

The early, private mental asylums in our country were grim places, and the treatment of patients cruel. Madmen were regarded as brutes, needing to be beaten, restrained and cured with unspeakably harsh modalities.²² In the 1750s in Philadelphia, for example, “the

¹⁷ ROY PORTER, *MADNESS: A BRIEF HISTORY* 89 (2002). Before the asylums of the nineteenth century, insanity was a “domestic responsibility—it remained so in Japan till well into the twentieth century. The seriously disturbed were kept at home, whilst the harmless might be allowed to wander, though as evil spirits [they] were thought to fly out of them to possess others, the deranged were feared and shunned.” *Id.* In the medieval world view, mental illness was commonly viewed as a form of diabolic possession, “schemed by Satan and spread by witches and heretics.” *Id.* at 19. Greek medical texts from the fourth century BC, however, held a view more akin to that of modern medicine, that madness was a disease of the brain. *Id.* at 36-37. One of the Hippocratic texts reads:

Men ought to know that from the brain, and from the brain only, arise our pleasures, joys, laughter, and jests, as well as our sorrows, pains, griefs, and tears . . . [i]t is the same thing which makes us mad or delirious, inspires us with dread and fear, whether by night or by day, brings sleeplessness, inopportune mistakes, aimless anxieties, absent-mindedness, and acts that are contrary to habit.

Id. at 37.

¹⁸ GERALD N. GROB, *MENTAL ILLNESS AND AMERICAN SOCIETY 1875-1940* 3 (1983).

¹⁹ *Id.*

²⁰ *Id.*

²¹ PORTER, *supra* note 17, at 95.

²² ROBERT WHITAKER, *MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL* 6 (2002). In a 1684 text on insanity, Thomas Willis

lunatics were kept in gloomy, foul-smelling cells and were ruled over by ‘keepers’ who used their whips freely. Unruly patients, when not being beaten, were regularly ‘chained to rings of iron, let into the floor or wall of the cell . . . restrained in hand-cuffs or ankle-irons.’”²³ Things in Europe at that time were not much better, although in 1774, the English Parliament passed the *Act for Regulating Madhouses, Licensings, and Inspection*, requiring a physician to certify a person as insane before he could be committed.²⁴ This statute at least protected some sane individuals from being arbitrarily committed by their families because they had become a nuisance; it also made physicians the sole arbiters of insanity—a monopoly that they hold to this day.²⁵ The array of “therapies,” however, was quite startling, literally.

argued that the insane were animal-like and had “descended to a brutish state,” capable of superhuman strength: “Discipline, threats, fetters, and blows are needed as much as medical treatment . . . Truly nothing is more necessary and more effective for the recovery of these people than forcing them to respect and fear intimidation.” *Id.* (alteration in the original) (quoting THOMAS WILLIS, *THE PRACTICE OF PHYSICK: TWO DISCOURSES CONCERNING THE SOUL OF BRUTES* (1684)).

²³ *Id.* at 4 (alteration in original).

²⁴ *Id.* at 9. In London, the asylum Bethlehem was the place for the poor insane, but wealthier Londonites sent their family lunatics to private madhouses, a trade that had emerged in the beginning of the eighteenth century:

These boarding homes also served as convenient dumping grounds for relatives who were simply annoying or unwanted. Men could get free from their wives in this manner—had not their noisome, bothersome spouses gone quite daft in the head? A physician who would attest to this fact could earn a nice sum—a fee for the consultation and a referral fee from the madhouse owner. Doctors who owned madhouses made out particularly well.

Id. at 8-9. Also of note, the word “bedlam” actually derives from the Bethlehem asylum:

The Hospital of St. Mary of Bethlehem was established in London in 1247, and had become famous as a “madhouse,” or insane asylum, by 1402. By 1547 it was incorporated as a Royal foundation “for the reception of lunatics.” As the “Bethlehem” hospital became more famous, the name was shortened in popular speech to “Bethleem,” “Bedlem,” and finally “Bedlam.” Simultaneously, “Bedlam” became a popular synonym for any “madhouse,” and by the 17th century “bedlam” was being used to mean any scene of great confusion or uproar.

WORD DETECTIVE (Nov. 27, 2001), <http://www.word-detective.com/112701.html>.

²⁵ WHITAKER, *supra* note 22, at 9. During this period, England was acutely interested in therapies for madmen because King George III (their monarch) “suffered a bout of madness.” *Id.* Historians now believe that King George III actually suffered from temporary delirium due to porphyria, a rare genetic disorder that can cause a build-up of toxic substances in the body, which, in turn, can cause bouts of delirium. *Id.* at 10. Some of the “treatments” imposed on the King by his physicians were close to torture, including putting him into a straight coat, raising blisters on his legs, bleeding him with leeches, sedating him with opium, and lacing his food with emetics to make him sick. *Id.*

Dunking patients in water, or pouring buckets of water on their heads from great heights were common; machines were devised to pummel patients with torrents of water, effective “as a remedy and a punishment.”²⁶ The “Bath of Surprise” was employed in many asylums where the lunatic would be led blind-folded into a room, and then suddenly dropped through a trapdoor into a tub of cold water—the theory being that the plunge would induce such terror “that the patient’s senses might be dramatically restored.”²⁷ Patients were also spun around in mechanical devices, such as rotating beds, stools, and boards; they were subject to bleeding, blistering, powerful purges, emetics, and nausea-inducing agents—“so fierce that the patient could not hope to have the mental strength to rant and rave.”²⁸ According to the doctors of the 1700s, the mad were to be tamed.²⁹ The cruelty imposed by the private asylum doctors was all in the name of medical treatment.³⁰

Towards the end of the eighteenth century, both in Europe and later in America, there was a sea change in attitudes towards the mentally ill and how to cure them. In the 1790s, the French physician, Philippe Pinel, was appointed by his government to tend to the Parisian

²⁶ *Id.* at 11.

²⁷ WHITAKER, *supra* note 22, at 11. One physician found this to be most useful and stated:

Maniacs have often been relieved, and sometimes entirely cured, by the use of cold bathing, especially when administered in a certain manner. This seems to consist, in throwing the madman in the cold water by surprise; by detaining him in it for some length of time; and pouring water frequently upon the head, while the whole of the body except the head is immersed in the water; and thus managing the whole process, so as that, with the assistance of some fear, a refrigerant effect may be produced. This, I can affirm, has been often useful.

Id. at 11-12 (footnote omitted). These techniques were used in the United States as well. In the late 1880s, Nellie Bly, a journalist, feigned mental illness and was sent undercover to the Women’s Lunatic Asylum on Blackwell’s Island in New York. NELLIE BLY, TEN DAYS IN A MAD-HOUSE 5 (2011). Bly described how she was forced into a tub of icy water, and then “bathed” by a “crazy woman [who] began to scrub” her:

Rub, rub, rub went the old woman, chattering to herself. My teeth chattered and my limbs were goose-fleshed and blue with cold. Suddenly I got, one after the other, three buckets of water over my head—ice-cold water, too—into my eyes, my ears, my nose and my mouth. I think I experienced some of the sensations of a drowning person as they dragged me, gasping, shivering and quaking, from the tub. For once I did look insane.

Id. at 57-58. The procedure sounds remarkably like water-boarding.

²⁸ WHITAKER, *supra* note 22, at 7, 12-13.

²⁹ *Id.* at 8.

³⁰ *Id.* at 9.

asylums.³¹ Pinel radicalized thought about how to treat mental illness.³² Influenced by the Revolutionary ideals of *liberté, égalité, fraternité*, Pinel removed the restraints from the patients under his care.³³ Under the sway of progressive, Enlightenment thinking, Pinel held that if insanity was a mental disorder, then it must be cured through the employment of mental approaches.³⁴ Pinel observed, “I then discovered, that insanity was curable in many instances, by mildness of treatment and attention to the state of mind exclusively, and when coercion was indispensable, that it might be very effectively applied without corporal indignity.”³⁵ Madness was seen as a “breakdown of internal, rational discipline on the part of the sufferer.”³⁶ This focus on the “management of the mind,” which Pinel called “*traitement morale*,” required the physician to be schooled in the different types of insanity, and to treat each type with its own suitable therapies.³⁷ Patients were to be spoken to with a “mildness of tone,” and never struck or restrained; their time would be filled not with idleness, but with useful activities, such as work, games, and other diversions.³⁸

During the same time period, the “Quakers in York, England were developing their own form of moral treatment” for the mentally ill, and their reforms “presented a much more vigorous challenge to

³¹ *Id.* at 20. Pinel initiated his reforms at the Bicêtre and Salpêtrière Hospitals in Paris. PORTER, *supra* note 17, at 104.

Prior to the Revolution, . . . [French] lunatics had been . . . kept in chains and fetters . . . suffer[ing] the extremes of heat and cold in their miserable cells. At Bicêtre . . . the insane were fed only one pound of bread a day . . . leaving them . . . ‘in a delirium of hunger.’ More than half of the men admitted to the asylums died within a year from starvation, cold, and disease.

WHITAKER, *supra* note 22, at 20 (footnote omitted).

³² *Id.* at 21.

³³ PORTER, *supra* note 17, at 104-05. “Pinel’s first act, immortalized in a famous painting by Robert Fleury that shows a patient kissing [Pinel’s] hand in gratitude, was to strike the chains off fifty-three . . . filthy [patients].” ALEX BEAM, *GRACEFULLY INSANE: THE RISE AND FALL OF AMERICA’S PREMIER MENTAL HOSPITAL* 11 (2001).

³⁴ PORTER, *supra* note 17, at 105.

³⁵ WHITAKER, *supra* note 22, at 21 (footnote omitted).

³⁶ PORTER, *supra* note 17, at 105.

³⁷ WHITAKER, *supra* note 22, at 21-22. “[Pinel] identified five ‘species’ of mental derangement[: fevers, phlegmasias, hemorrhages, neuroses, and diseases caused by organic lesions.]” *Id.* at 22.

³⁸ *Id.* In such a hospital, Pinel envisioned that “[a] lay superintendent, imbued with a humanitarian philanthropy toward the mentally ill, would govern the asylum . . . ‘the resources of nature’ could be ‘skillfully assisted in her efforts’ to heal the wounded mind.” *Id.*

the medical establishment.”³⁹ The Quakers were a socially radical group, “refus[ing] to pay tithes to the church, bear arms, or show obeisance to the king,” choosing to live in a simple manner, adopting pacifism, believing that all people were equal before God.⁴⁰ The Quakers were also very skeptical of the medical profession.⁴¹ When one of their members, Hannah Mills, died in 1792 from ill-treatment and neglect at the York asylum, their leader, a tea merchant named William Tuke, was prompted to build a retreat for their mentally ill.⁴² The Quakers set out to create a community in which the ill were treated with gentleness and respect; patients were kept busy with a variety of useful tasks—sewing and gardening, for example, although they were also encouraged to read, write, and play chess.⁴³ In a rural setting, with gardens and walks, the York Retreat was “modelled on the ideal of bourgeois family life, and restraint was minimized. Patients and staff lived, worked, and dined together in an environment where recovery was encouraged through praise and blame, rewards and punishment, the goal being the restoration of self-control.”⁴⁴ Medical therapy was dispensed with in favor of simple, common-sense methods, not trying to talk a patient out of his “mad thoughts,” but trying to treat him as a rational being—“to hold up to their patients a mirror that reflected an image not of a wild beast but of a worthy person capable of self-governance.”⁴⁵ The results of the York Retreat were remarkable: during its first fifteen years, seventy percent of the patients who had been ill for less than twelve months recovered, and even twenty-five percent of those who had been chronically ill and viewed as incurable recovered under the Quaker’s gentle form of moral treatment.⁴⁶ All of

³⁹ *Id.*

⁴⁰ WHITAKER, *supra* note 22, at 22. “The Quaker movement [was] founded in the 1650s by [a group of] people” who were unhappy with the class-consciousness and authoritarianism of the Protestant Church. *Id.* Often “persecuted for their beliefs—they were not allowed . . . to earn degrees from the two universities in England—[but] they prospered as merchants and farmers . . .” *Id.* at 22-23.

⁴¹ *Id.* at 23.

⁴² *Id.*; PORTER, *supra* note 17, at 104.

⁴³ WHITAKER, *supra* note 22, at 23.

⁴⁴ PORTER, *supra* note 17, at 104.

⁴⁵ WHITAKER, *supra* note 22, at 24.

⁴⁶ *Id.* Neither were the patients confined, although there were two dark, quiet rooms for controlling rowdy patients. *Id.* “In its first fifteen years of operation, not a single attendant at the York Retreat [had been] seriously injured by a violent patient”; this was true, even though “the majority had been ‘insane’ for more than a year, and many had been previously locked up in other English asylums . . .” *Id.*

this was accomplished without the external powers of medicine; rather the “cure” lay within the mind of the patient himself.

Together, Pinel and the York Quakers presented to the Europeans, and eventually to the Americans, a new way to approach the mentally ill: not as brutish animals, but as distressed people who had the inner capacity to regain self-control by regaining their reason.⁴⁷ Philadelphia Quakers opened the first moral treatment asylum in the United States in 1817, and others followed as well.⁴⁸ Most of these early asylums were privately funded, and primarily catered to the wealthy, but soon the states began building moral treatment asylums for the poor who were mentally ill.⁴⁹ There was a blueprint for the moral treatment asylum; all were located in the country; the grounds were landscaped with gardens and flowerbeds where the mentally ill were free to wander and tend to the plants.⁵⁰ The building itself was to be architecturally pleasing, and the asylum was to be governed by a superintendent who was to be humane, compassionate, who would know his patients well, who would dine with them, and ultimately, like a father figure, would guide them gently towards the path of reason.⁵¹

Thomas Kirkbride, a Quaker physician who governed the Pennsylvania Hospital for the Insane from 1841 to 1883, was the quintessential purveyor of moral treatment.⁵² Kirkbride’s hospital design, a linear plan with short, but connected pavilions, was widely emulated as the country engaged in a frenzy of hospital building.⁵³ In

⁴⁷ *Id.* at 24-25.

⁴⁸ WHITAKER, *supra* note 22, at 25. “The social elite of Boston, led by the members of the Congregational Church, [also] established [a moral treatment asylum], which later became known as McLean Hospital. Bloomingdale Asylum in New York City opened in 1821,” and Hartford Retreat also opened three years later. *Id.*

⁴⁹ *Id.* “The first such public asylum opened in Worcester, Massachusetts, in 1833, [but] by 1841, there were sixteen private and public asylums . . . that [were providing] moral treatment to the insane.” *Id.* Comparable reform programs were developed elsewhere, such as in Florence where Dr. Vincenzo Chiarugi repudiated medication and restraint, and promoted therapies that treated the mentally ill as human beings. PORTER, *supra* note 17, at 104.

⁵⁰ WHITAKER, *supra* note 22, at 25-26.

⁵¹ *Id.* at 26.

⁵² *Id.* at 31. Thomas “Kirkbride . . . [had been] raised on 150-acre farm in Pennsylvania[, h]is family [had] observed [all the] Quaker religious traditions, and . . . he [had] attended [the] religious schools run by the Friends Society.” *Id.* Kirkbride had graduated from the University of Pennsylvania, and had done his residency at Friends Asylum in Frankford near Philadelphia, where he had been steeped in the principles of moral treatment. *Id.*

⁵³ CARLA YANNI, THE ARCHITECTURE OF MADNESS: INSANE ASYLUMS IN THE UNITED STATES 51 (2007). “Generally, large asylums in which . . . patients lived under one roof were called congregate hospitals. The Kirkbride plan, [was a] linear plan, . . . a type of congregate hospital, made up of short but connected pavilions, arrayed in a shallow V.” *Id.* For a

Pennsylvania, Kirkbride's hospital featured a lovely dining room, a day room for playing games, a bowling alley, a greenhouse, and a museum, and was meticulously landscaped so that patients could see that "even every tree that buds, or every flower that blooms, may contribute in its small measure to excite a new train of thought, and perhaps be the first step towards bringing back to reason, the morbid wanders of the disordered mind."⁵⁴ The patients were kept on a strict schedule, exercising daily in the gym at 6:00 a.m., taking classes in reading or sewing, attending evening entertainment featuring magic lantern shows, guest lectures, concerts, and theatrical performances.⁵⁵ Patients stayed in semi-private rooms that had a chest of drawers, a mirror, and paintings to make them "feel respected and surrounded by comfort."⁵⁶ Kirkbride made an effort to ensure that the hospital attendants had the proper temperament to treat the patients kindly, requiring all job applicants to provide character references, seeking to only employ those who had "a pleasant expression of face, gentleness of tone, speech and manner, a fair amount of mental cultivation, imperturbable good temper, patience under the most trying provocation, coolness and courage in times of danger, cheerfulness without frivolity."⁵⁷ These institutions were full of optimism and idealism—and they served relatively small patient populations.⁵⁸

Of the same era, Dorothea Dix, activist and reformer, appealed to the humanitarian impulses that moral treatment drew upon as she

fascinating website devoted to the remaining hospitals that were built on the "Kirkbride" plan, see KIRKBRIDE BUILDINGS, <http://www.kirkbridebuildings.com/> (last visited Nov. 13, 2018).

⁵⁴ WHITAKER, *supra* note 22, at 31 (internal quotation marks omitted). "The keepers at the Friends Asylum," founded in 1817 in Philadelphia by William Tuke's grandson, Samuel Tuke, "were particularly proud of the light, airy space, since proper ventilation was considered absolutely critical for both psychological and bodily care." YANNI, *supra* note 53, at 33. "[A]ll written works about asylum and hospital construction[] reflect[ed] the widely held miasma theory of contagion, the medical assumption that noxious exhalations from humans polluted the air and caused disease." *Id.* at 33-34.

⁵⁵ WHITAKER, *supra* note 22, at 31.

⁵⁶ *Id.* at 32. As Dr. George Wood, one observer, reported in 1851:

Scattered about the ground, in the different apartments of the main building, or in the out-houses, you encounter persons walking, conversing, reading or variously occupied, neatly and often handsomely dressed, to whom as you pass you receive an introduction as in ordinary social life; and you find yourself not unfrequently quite at a loss to determine whether the persons met with are really the insane, or whether they may not be visitors or officials in the establishment.

Id.

⁵⁷ *Id.*

⁵⁸ GROB, *supra* note 18.

lobbied during the 1840s and 1850s on behalf of the mentally ill.⁵⁹ Dix herself had suffered a breakdown as a young woman, and had been sent by her family to live with the family of William Rathbone, a grandson of William Tuke.⁶⁰ It was in England that Dix became schooled in the Quaker reforms for the mentally ill, and upon her return, she vowed to bring this humanitarian form of treatment for the mentally ill to all of the United States.⁶¹ Dix was indefatigable as a lobbyist.⁶² In each state, she would survey the local prisons and poor houses, and then would regale the legislature with the inevitable tales of suffering that her research had turned up.⁶³ Dix was also wildly successful; in response to her dramatic appeals, twenty states built, or enlarged, their state hospitals, and the number of mental hospitals in

⁵⁹ NOTABLE AMERICAN WOMEN 1607-1950: A BIOGRAPHICAL DICTIONARY 488 (Edward T. James et al. eds., 1971). From 1845 to 1848, Dix:

[C]overed 30,000 miles in Pennsylvania, Kentucky, Maryland, Ohio, Illinois, Mississippi, Alabama, Tennessee, North Carolina, and other states, painstakingly conducting her investigations and preparing for the state legislatures her now-famous “memorials.” Though *less* extensive than her earlier reports and eventually somewhat routinized, these memorials marshaled sufficient evidence of neglect and abuse to shame most legislatures into action. She sometimes remained in a state until the appropriations for new facilities had been made, and on occasion had the pleasure of selecting the site for a new hospital.”

Id.

⁶⁰ WHITAKER, *supra* note 22, at 34.

⁶¹ *Id.*

⁶² *Id.* Although the most prominent and instrumental, Dix was not the only woman to take an interest in the conditions of the institutionalized. In the late 1880s, Nellie Bly, a journalist, feigned insanity in an undercover assignment to discover the conditions of the Blackwell Island’s Insane Asylum, resulting in a memoir. BLY, *supra* note 27. Once committed by a cadre of doctors (who were later embarrassed professionally for not seeing through her ruse), Bly discovered that conditions were grim: lack of heat; spoiled meat and butter; dirty water; frigid bathwater; rats and cockroaches, and worst of all, cruel and inhuman treatment by the staff. *Id.* at 54-55, 58, 71-72. Dangerous patients were tied together “on the rope”:

A long cable rope fastened to wide leather belts, and these belts locked around the waists of fifty-two women. At the end of the rope was a heavy iron cart . . . [s]ome were yelling all the while . . . [m]y heart thrilled with pity when I looked on old, grey-haired women talking aimlessly to space. One woman had on a straightjacket, and two women had to drag her along. Crippled, blind, old, young, homely, and pretty; one senseless mass of humanity. No fate could be worse.

Id. at 66. Bly’s scathing report resulted in more money being allocated for the asylum. *Id.* at 94.

⁶³ WHITAKER, *supra* note 22, at 34. Dix had literary flair. *Id.* To the Massachusetts State Legislature in 1843, she reported on: “Insane Persons confined in this Commonwealth in cages, closets, cellars, stalls, pens! Chained, naked, beaten with rods, and lashed into obedience!” *Id.* (internal quotation marks omitted).

the country, both private and public, leaped from 18 in 1840 to 139 by 1880.⁶⁴

Moreover, the medical establishment itself engaged in some intense lobbying.⁶⁵ That Thomas Kirkbride was a physician and assumed that asylums would be led by a physician, was no quirk of fate. With the rise of the Quaker's moral treatment, the physicians had felt threatened.⁶⁶ If society was in a flurry of asylum building, it needed to be made clear that the medical establishment, not civic or religious groups, was going to be at the helms of these new mental hospitals. For example, the Connecticut State Medical Society lobbied the state and civic groups for money to build a local asylum, and in return for this fund-raising, the Society exacted a promise that the superintendent would be a physician.⁶⁷ When the Hartford Retreat opened in 1824, its new superintendent, Dr. Eli Todd, insisted that both medical treatment, as well as moral treatment, would be used to care for the insane.⁶⁸ Medicine was reclaiming its jurisdiction over the treatment of the insane, and physicians were appointed to run the new facilities in Massachusetts, New York, and other states.⁶⁹ As physicians gained control of the asylums, they interjected medical remedies into the moral treatment regime, using mild cathartics, bloodletting, and various drugs such as morphine and opium to sedate

⁶⁴ *Id.* This was part of a great flurry of hospital-building in general. *Id.* Another 1873 survey "counted 178 hospitals [in the United States], [with] fifty of [them being] institutions for the mentally ill." THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE, 1876-1915* 286 (1991). A 1923 report listed "6,830 [hospitals], or an increase of about 3,800 per cent" since the 1873 survey. *Id.* "In the same way that early nineteenth-century towns built opera houses or colleges as testaments to their modernity, so communities and county seats in the late nineteenth century put up new hospitals." *Id.* The nursing profession also proliferated during this time period. "In the last third of the nineteenth century, nursing schools were established, attracting middle-class women who [wanted to serve] others." *Id.* "Between 1900 and 1910, the number of trained nurses multiplied sevenfold." *Id.*

⁶⁵ WHITAKER, *supra* note 22, at 28.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Todd noted, "The Quakers in York, . . . 'have placed too little reliance upon the efficacy of medicine in the treatment of insanity, and hence their success is not equal to that of other asylums in which medicines are more freely employed.'" *Id.*

⁶⁹ WHITAKER, *supra* note 22, at 28. Asylum medicine itself became a specialty, and in 1844, "superintendents at thirteen asylums formed the Association of Medical Superintendents of American Institutions for the Insane (AMSAIL)" to promote the interests of medicine; one of its first actions was to pass "a resolution stating that an asylum should always have a physician as its chief executive officer and superintendent." *Id.* at 28-29.

their patients.⁷⁰ This use of chemical restraints made the physicians more receptive to the use of physical restraints, particularly as the asylums became overcrowded.⁷¹

And overcrowding became a tremendous problem.⁷² Dix's wild success ironically served "as the catalyst for the downfall of moral treatment."⁷³ In order for moral treatment to work, patients needed to be housed in a small facility with the peaceful atmosphere of a home, and in the early days of moral treatment, superintendents referred to their patients and staff as an extended family.⁷⁴ But the influx of mentally ill patients into state hospitals in particular made moral treatment impossible. The statistics speak for themselves. "In 1840, only 2,561 mentally ill patients in the United States were being cared for in hospitals and asylums;" by 1890, the population of mentally ill patients in state hospitals alone numbered 74,000.⁷⁵ The earlier asylums had smaller patient populations of the potentially curable insane, but once the larger, state medical institutions were built, patients with all kinds of illnesses, physical as well as mental, began to flood into the new institutions.⁷⁶ "Syphilitics, alcoholics, and the senile elderly joined the newly insane in these hospitals, and this flood of diverse patients doomed moral treatment."⁷⁷ As Roy Porter has

⁷⁰ *Id.* at 29.

⁷¹ *Id.* For example, mitts and straightjackets were commonplace. *Id.* The Utica Lunatic Asylum in New York "devised a crib with a hinged lid . . . [that] confin[ed] disruptive patients at night"; it was so claustrophobic that patients would fight against it violently, and eventually collapse from exhaustion. WHITAKER, *supra* note 22, at 29. "In 1844, [the] AMSAII formally embraced the use of physical restraints, arguing that [not to use them] 'is not sanctioned by the true interests of the insane.'" *Id.*

⁷² *Id.* at 34-35.

⁷³ *Id.* at 34.

⁷⁴ *Id.* The AMSAII claimed that no single asylum should house more than 250 patients. WHITAKER, *supra* note 22, at 34. The state hospitals also could not keep up the opulence of the earlier moral treatment private asylums; they cut costs in the following ways:

[B]y forgoing the day rooms, the reading parlors, the bathing facilities, and the other amenities that were essential to moral treatment. Recreational activities, magic-lantern shows, and educational programs all disappeared. The insane poor were indeed now being kept in "hospitals," but they weren't receiving moral treatment as envisioned by the Quakers in York.

Id. at 35.

⁷⁵ *Id.* at 34.

⁷⁶ *Id.*

⁷⁷ *Id.* And the American public was aging so that there were more people to suffer from senile dementia. The "aging of the American population from 1870 to 1920 can be" seen in these statistics: "the number of young people (aged fourteen to twenty) dropped, the portion

pointed out, the psychiatrists were victims of their own propaganda. By insisting that many aberrant and antisocial behaviors were actually mental—and medical—disorders, and therefore in need of the physician and his asylum, difficult cases that used to end up in jails or workhouses ended up in the asylum, with little chance of rehabilitation.⁷⁸ Again, the senile, the demented, epileptics, those suffering from tertiary syphilis, and other degenerative neurological disorders, “were increasingly shepherded through the asylum gates. For all such conditions, the prognosis was gloomy, and the asylum became a dustbin for hopeless cases.”⁷⁹ The optimism of the 1840s when it was believed that insanity could be cured—and often was—gave way to a pessimism in the later part of the nineteenth century.⁸⁰ Not only that: the attitude of kindness that moral treatment had generated towards the mentally ill had all but disappeared.

Now would be a good time to narrow our focus to the history of how the mentally ill of the five boroughs of New York City, and the nearby counties of Nassau and Suffolk, were cared for—this is the history that explains the presence of the large asylum cemetery next to our law school in Central Islip, fifty miles east of New York City. Nothing of the historical narrative will be sacrificed by narrowing the focus in this way, however. What happened to the mentally ill in New York City was repeated throughout the country: ambitious building projects of immense, brick state mental hospitals, the residuum and ultimate demise of the theory of moral treatment, a crisis of overcrowding, a trend towards lengthy institutionalization, the use of psycho-surgery and electro-shock therapies, and eventually the closing of the mental hospitals in the middle of the twentieth century. The story repeats itself over and over again.

At the same time, we must remember that these Long Island mental hospitals were populated by the mentally ill of New York City.⁸¹ Because it was New York City, what happened there was not only trend-setting, but was also played out on a large scale. During the 1950s and 1960s, the complex of the four Long Island state hospitals (Central Islip, Pilgrim State, Kings Park, and Edgewood) cared for

of older people (aged sixty-five and older) rose, and the nation’s median age increased from (20.2 to 25.3).” SCHLERETH, *supra* note 64, at 282.

⁷⁸ PORTER, *supra* note 17, at 119.

⁷⁹ *Id.*

⁸⁰ WHITAKER, *supra* note 22, at 36.

⁸¹ POLASKI, *supra* note 5, at 7.

37,500 mental patients from New York City and its suburbs. Its capstone, Pilgrim State, was the largest mental hospital in the world, housing more than seventy-seven percent of New York City's demented patients and thirty-seven percent of New York State's demented patients.⁸² But despite the fact that we are now focusing on New York City, the history of its care of the mentally ill dovetails with the history of the care of the mentally ill in the rest of the United States. Nothing is lost by zooming in on New York City.

New York City first established a poor house in the early part of the nineteenth century on Blackwell's Island, now Roosevelt Island, in the East River, housing the sick and poor from Manhattan and the Bronx (which did not become a separate county until 1914).⁸³ By the middle of the century, a need to separate the "lunatics" from the other inmates was perceived, and a new asylum was opened for mentally ill women on Blackwell's Island, and for mentally ill men on Ward's Island, now Randall's Island, and on Hart Island, east of City Island.⁸⁴ Towards the end of the century, however, these island asylums were: "horribly overcrowded and the buildings dilapidated beyond further use; the sad inmates in them also had too little room to be productively occupied and thus diverted from their illnesses."⁸⁵ Kings County, which was then the City of Brooklyn, had also constructed an asylum in Flatbush during the early part of the nineteenth century for its poor and mentally ill; it consisted of four buildings, an almshouse, hospital, nursery, and lunatic asylum.⁸⁶ While an 1824 report indicated that the inmates were well cared for in a well-designed building, allowing them to walk around in the halls and enclosed yard without restraint, by the later part of the century, like the island asylums, the Brooklyn asylum was also overcrowded; hospital administrators "did not believe that kindness was more effective than bodily restraints," bringing the Flatbush asylum to a "sorry condition."⁸⁷ Queens County, which at that time comprised the rest of what is now Nassau County, housed its indigent insane in a "wretched asylum" in Mineola.⁸⁸

⁸² *Id.*

⁸³ *Id.* at 5.

⁸⁴ *Id.* On Blackwell's Island, they used structures that had formerly been occupied by the Department of Emigration. *Id.*

⁸⁵ POLASKI, *supra* note 5, at 5-6.

⁸⁶ *Id.* at 6.

⁸⁷ *Id.*

⁸⁸ *Id.* Queens County also put its indigent insane:

Meanwhile, the State of New York began to assume responsibility for mentally ill citizens, spurred on by the lobbying efforts of Dorothea Dix, Horace Mann, and Dr. Sylvester Willard.⁸⁹ The State's first facility, the New York Lunatic Asylum, opened in Utica in 1843. The Willard Asylum opened in 1869 for the chronically insane, and within four years, three more upstate hospitals were established, intended to house all the mentally ill who were then being kept in county almshouses.⁹⁰ At first, New York County (Manhattan) and Kings County (Brooklyn), among others, were exempted from sending their mentally ill to the state hospitals, since they were operating their own facilities, but by the 1870s, the state decided that those exempted counties

were operating facilities which had again become deplorable and that the inmates in them were being given little medical care, inadequate food, and no exercise or occupation. Mechanical restraints were commonly used to quiet the patients there, and far too few attendants and doctors had been hired to staff them.⁹¹

Finally in 1873, the State Commission in Lunacy decided that the care for the mentally ill must be taken away from the counties, and brought under the umbrella of state-run asylums—a process which took several decades.⁹²

Kings County had been the first county to open a “lunatic farm” in rural Long Island, initially to absorb some of the overflow of patients

[O]ut to board with families by awarding them to those with the lowest bids, or they auctioned them off to the highest bidders as laborers, not unusual practices in rural communities in the early 1800s. Richmond County, Staten Island, also followed this method of dealing with its mentally ill then, as did Suffolk County.

Id. Suffolk was always a separate County—Nassau County was formed in 1899 by the division of Queens County, after the western portion of Queens had become a borough of New York City in 1898.

⁸⁹ POLASKI, *supra* note 5.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 6-7. The State Commission of Lunacy was created in 1873 in order “to oversee the care of all insane persons” in the state, and it quickly concluded that “the intolerable conditions at both the county poorhouses and at their asylums could only be alleviated by having all mental patients, acute and chronic, brought under State care in its own asylums.” *Id.* at 6.

from Flatbush.⁹³ In 1885, the county purchased 893 acres of farmland and woodland in Suffolk County, and quickly constructed three small buildings to house the twenty-three female and thirty-two male patients.⁹⁴ These patients were immediately set to work clearing the land, and started to farm, work that “would be part of their therapy and would also provide some food.”⁹⁵ By 1889, sixteen cottages, a laundry, a heating plant, and a barn were built for 450 mental patients from Brooklyn; the institution was named “Kings Park,” and it became the first of the Long Island farm colonies.⁹⁶ Serving the mentally ill from Manhattan, the second farm colony was established to the south, in Central Islip, and was located where the campuses of New York Institute of Technology, Touro Law Center, and the state and federal court complex now stand.⁹⁷ The facility was designed to be an “experiment of a farm colony for ‘able-bodied, chronic, insane patients.’”⁹⁸ Much like the development of the Kings County farm colony, New York County’s farm colony began with a purchase of a large tract of rural Long Island land in 1887, and the immediate construction of ward buildings, dining halls, kitchens, and bakeries.⁹⁹ Again, the first buildings were built by the patients themselves; the first patients to be transferred from the City were “forty able-bodied men who worked to clear farmland, and they were soon joined by a hundred more. The first female patients arrived in 1892 and were quickly assigned to work in the laundry and to perform housekeeping services.”¹⁰⁰ By 1895, the farm colony in Central Islip supported a

⁹³ POLASKI, *supra* note 5. The land was purchased from some twenty local residents of the hamlet of St. Johnland, now Kings Park, in 1885. *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ ANNE FRANCES PULLING, CENTRAL ISLIP, MY HOME TOWN 11-12 (1976). Dr. George McDonald, of Ward’s Island, was the first administrator, having been appointed in 1895. VERNE DYSON, THE HISTORY OF CENTRAL ISLIP 45 (1954). “[I]n 1890, forty women patients arrived[;] . . . [t]here were three clusters of three buildings with [a] dining room, bakery, and kitchen in each cluster.” PULLING, *supra*, at 11. Three more clusters were added in 1893, “the first brick buildings on the hospital grounds[.]” and by 1895, “the patient population reached 1,000.” *Id.* The Commissioners of Charities and Corrections of the City of New York purchased “1,000 acres of land, at \$25 an acre, in Central Islip[,] one mile south of the Long Island Railroad[,] and along Carleton Avenue.” DYSON, *supra*, at 45.

⁹⁸ DYSON, *supra* note 97, at 46.

⁹⁹ POLASKI, *supra* note 5, at 7.

¹⁰⁰ *Id.* The first inmates came from all of the overcrowded New York County asylums, those on Blackwell’s, Ward’s, and Hart Islands. *Id.* In 1893, three groups of three brick wards each were built, “with a kitchen and dining hall . . . in the center of each group. . . . [I]n 1895,

patient population of 1,000, and had a plant consisting of thirty buildings.¹⁰¹ Finally, in 1896, New York State transferred the care of all patients from the various New York City asylums for the insane, and consolidated them into state institutions.¹⁰²

It was apparent that the farm colonies on Long Island were very much influenced by moral treatment in the early days of their operation. The new notion of “occupational therapy” encouraged patients to be engaged in some useful activity to facilitate their recovery, leaving their dayrooms “where they might have been just staring at a wall all day, and to learn and perform some task, some skill, some occupation, in which the doing of the activity would help to distract them from their symptoms, and possibly from displaying inappropriate behaviors.”¹⁰³ Patients were trained in a myriad of skills: basket weaving, hoop and frame weaving, sewing, pottery making, watch repair, typing, stenography, bookkeeping, print making, baking and cake decoration, shoe making and repair, greenhouse work, concrete making, mattress making, woodworking, metal working, and

. . . 700 patients were transferred into them from the very overcrowded island asylums near Manhattan.” *Id.*

¹⁰¹ DYSON, *supra* note 97, at 46. Visitors of the patients at Central Islip State Hospital were able to take the Long Island Railroad with a round trip ticket between Penn Station and Central Islip costing \$1.20. PULLING, *supra* note 97, at 13. The hospital purchased a train from the Long Island Railroad in 1909 that shuttled between the north and south colonies, a distance of about two miles, consisting of one engine, and a baggage car. *Id.* Later a new wooden car designed to take passengers was purchased, and it shuttled passengers back and forth from Long Island City to the hospital. The train from Central Islip would take it to Long Island City, and when it returned, the wooden shuttle car would be added to the hospital locomotive; there could be as many as two to three hundred visitors each Sunday. *Id.* Unfortunately, “the state of New York ordered the train to be discontinued in . . . 1934 . . .” DYSON, *supra* note 97, at 49.

¹⁰² POLASKI, *supra* note 5, at 7. The Central Islip farm colony became the Manhattan State Hospital of Central Islip by legislative fiat in 1896, and in 1905, the name of the institution was changed to the Central Islip State Hospital. DYSON, *supra* note 97, at 47. New York State experimented in 1869 with the Willard Asylum in upstate Ovid, in the Finger Lakes region, “designed for chronic pauper insane persons previously confined in county poorhouses, and for insane persons discharged from state hospitals as incurable.” GROB, *supra* note 18, at 76. This did not prove to be a panacea; within two years Willard had grown so rapidly that it could no longer accept all the state’s chronic patients, causing the legislature to authorize “the State Board of Charities to exempt any county from the requirement of sending chronic cases to Willard if the county provided proper buildings and had the means to care for such persons.” *Id.* Even these exemptions disappeared with legislation in the 1890s, transferring power to care for the mentally ill to the state. *Id.* at 89-90.

¹⁰³ POLASKI, *supra* note 5, at 101. “Occupational [t]herapy [first] came into being when Eleanor Slayle organized a class in 1913” in the School of Nursing that had begun in 1896. PULLING, *supra* note 97, at 13.

of course, when the weather was good, in farming.¹⁰⁴ Recreational therapy, with both indoor and outdoor activities, helped to “keep the participants in touch with reality,” and brought the patients “into social contact with each other and provided them with feelings of individual and joint success, helping to relieve loneliness and providing them with opportunities to cooperate with, and appreciate, other people, all therapeutically beneficial attitudes.”¹⁰⁵ The sporting events included softball, miniature golf, roller skating, bowling, swimming, tennis, track, volleyball, basketball as well as patient Olympic Games and many field days that included “footraces, softball games, hot dogs, hamburgers, a parade, a beauty pageant, and even a Maypole with female patients dancing around it.”¹⁰⁶ There were theatrical and social events as well, with patient and staff dances, picnics in the summer time, talent shows, group exercises to music, elaborate shows using patients and staff as performers, corny melodramas, choirs, music lessons—any kind of activity to enhance socialization, and to arouse the “healthy emotions of contentment and warmth towards others, as well as fond memories of a gentler past.”¹⁰⁷ Patients also had public

¹⁰⁴ POLASKI, *supra* note 5, at 101-06, 108-14, 116. Central Islip had beautiful grounds, kept mostly by patients, including many “shade trees, flowering bushes, lawns,” and landscaped gardens. *Id.* at 102. “CI also had the sunken garden . . . which provided a quiet and restful place for patients to have lunch and listen to music with their attendants and for student nurses to gather during their free time.” *Id.* In November of each year, Pilgrim State Hospital, opened in Brentwood, in Suffolk County, in 1931 would have a sale, open to the public, of all the crafts made by the patients in their assembly hall that “was also used for indoor sports, movies, religious services, dances, parties, . . . and stage shows[;]” it could seat over 1500 patients and employees. *Id.* at 106. The patients in the hospitals sewed “all of [the] doctors’ . . . gowns, the hospital’s bed linens and towels, and all of the dresses, undergarments, nightgowns, bathrobes, and other articles of women’s clothing which the patients needed. Men’s clothing was manufactured and repaired in separate tailor shops, also staffed by patients.” *Id.* at 107. The farming was extensive; “CI’s farm yearly produced about 780,000 pounds of milk and [about] 490,000 eggs, about a fifth of the hospital’s needs.” POLASKI, *supra* note 5, at 113. “Hay, grain, and corn were raised to feed the animals[;]” patients “benefited from this therapeutic outdoor work, especially if they had rural backgrounds.” *Id.*

¹⁰⁵ *Id.* at 76.

¹⁰⁶ *Id.* at 84-85, 88. Central Islip had a pool hall, and all the other hospitals had recreational rooms, equipped for patients to play ping pong, hockey, shuffle board, with tables for playing cards, board games, and pianos. *Id.* at 77-78. Besides the field days, there were picnic days and carnival days, with sun shelters erected on the recreational fields “used as serving areas for the food[,] hot dogs, hamburgers, fried chicken, sandwiches, milk, cold soda and juice, and ice cream . . .” POLASKI, *supra* note 5, at 86. The recreation departments also maintained marching bands and color guard units, and these bands often performed in “fire department and civic parades[;] d]ance bands, an orchestra for plays and shows, and a hillbilly band were also” formed. *Id.*

¹⁰⁷ *Id.* at 92. “Many professional entertainers donated their time to entertain the hospitals’ patients . . . [such as the] 37 members of F.B. Keith’s Vaudeville Exchange, [who always]

spaces, such as ward dayrooms, solariums, libraries, and the community stores where they could seek solitude, or be in the company of others.¹⁰⁸ The spiritual lives of the patients were tended to as well. Weekly Christian services were held in the assembly halls and ward chapels, sometimes with organ music and a patient choir, and Jewish holidays were also celebrated “with as much beauty and ceremony as possible.”¹⁰⁹

These descriptions of patient care, and the therapeutic activities and services provided to the patients of the Long Island farm colonies came right out of the “moral treatment” handbook, but over time, the legacy of moral treatment seems to have come to an end.¹¹⁰ Unfortunately, from the 1930s to the 1960s, the quality of life for the patients in the Long Island state hospitals took a turn for the worse.¹¹¹ Overcrowding, cutbacks in state funding for the mentally ill, the elimination of patient occupations, chronic staff shortages,¹¹² an increasing reliance on mood-altering drugs, the use of televisions to “babysit” patients, and eventually the knowledge that the hospitals would someday close all adversely impacted patient care.¹¹³ The State of New York also decided that instead of building more hospitals, or adding to the existing ones piecemeal, the problem of overcrowding would be solved once and for all by the construction of Pilgrim State

traveled to Kings Park [when] they were doing shows in the New York area.” *Id.* at 82. Outdoor concerts were very popular, and were often performed by the patients’ band. *Id.* at 92.

¹⁰⁸ POLASKI, *supra* note 5, at 93. In the “[c]ommunity stores patients could use their own money . . . to [buy] treats such as snacks, candy, cigarettes and cigars, . . . small presents, newspapers,” and the like; there were also snack bars that served food at lunchtime and ice cream throughout the day, “popular places for patients to meet with their friends and for employees to have lunch.” *Id.* at 93. There were ward libraries, and also central libraries that patients with honor passes could visit; the central libraries held about five thousand volumes, newspapers and magazines. *Id.* at 95.

¹⁰⁹ *Id.* at 98-99.

¹¹⁰ WHITAKER, *supra* note 22, at 20; POLASKI, *supra* note 5, at 7.

¹¹¹ POLASKI, *supra* note 5, at 35.

¹¹² DYSON, *supra* note 97, at 45. Initially, the employees came not only from Long Island, and other parts of the United States, but many were Irish immigrants; “help wanted” advertisements were printed in Irish newspapers. *Id.* “An Irish-American Club was formed among the employees in 1936.” PULLING, *supra* note 97, at 15. During World War II, “there was a drastic shortage of help so Dr. Frank Smith of the S group went to the Carolinas to recruit black people. The response was most favorable and black settlements sprang up around the village.” *Id.* at 16.

¹¹³ POLASKI, *supra* note 5, at 35.

Hospital.¹¹⁴ Pilgrim State, built partially with WPA funds,¹¹⁵ opened in 1931, and had an intended capacity of 12,500 patients, making it then the largest psychiatric hospital in the world.¹¹⁶ Moral treatment had always depended upon having a small population of patients, where personal relationships could be nurtured and patients could “get well” from the kindness expended upon them by a large staff of trained caretakers. These were no longer the conditions in the state mental hospitals, and the term “farm colonies” fell into disuse.¹¹⁷

The shift away from moral treatment to new psychiatric therapeutic interventions was part of the effort to emulate the “alleged successes of scientific medicine.”¹¹⁸ One such method of treatment was insulin shock treatment, and its precursor, Metrazol shock

¹¹⁴ *Id.* at 7.

By the 1920s, there were six State mental hospitals receiving patients from New York City’s five boroughs and the Counties of Nassau and Suffolk: Manhattan State Hospital, now consolidated on Randall’s Island, Brooklyn State Hospital, on the old Flatbush site, Creedmoor State Hospital in Queens Village, . . . Hudson River State Hospital in Poughkeepsie, receiving little-visited City patients, and Kings Park and Central Islip State Hospitals. All were seriously overcrowded [due to] New York City’s population growth.

Id. The rate of increase in population in New York between 1910 and 1920 was tremendous, from 4,766,883 to 5,620,048. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 143 (1975).

¹¹⁵ WPA refers to the Works Progress Administration, an ambitious New Deal employment and infrastructure program created by President Roosevelt in 1935, putting roughly 8.5 million Americans to work. *Work Progress Administration (WPA)*, HISTORY, <https://www.history.com/topics/great-depression/works-progress-administration> (last updated Aug. 21, 2018).

¹¹⁶ POLASKI, *supra* note 5, at 7. “Edgewood State Hospital in Deer Park was begun in 1938 . . . but wartime shortages of steel and construction . . . [plus] a postwar decision by New York State that it could not afford another [immense state] mental hospital of Pilgrim’s size after the WPA funding [dried up], [ensured] that it would never be completed.” *Id.* “During World War II, Edgewood was turned over to the Army, . . . [then called the] Mason General Hospital, a psychiatric hospital for servicemen, and a handful of prisoners of war.” *Id.* It was also used as a hospital for mental patients who had TB, eventually becoming a unit of Pilgrim State. *Id.* Edgewood was demolished in 1989; for a video of the demolition see EDGEWOOD HOSPITAL, <http://www.edgewoodhospital.com/video.asp> (last visited Nov. 13, 2018).

¹¹⁷ POLASKI, *supra* note 5, at 6-7.

¹¹⁸ GROB, *supra* note 18, at 291. The interest in therapeutic innovations was not specific to the 1930s; during the early decades of the twentieth century, moral treatment became deemphasized, partly because “an ever-increasing proportion of patients in hospitals had severe somatic disorders, and a psychologically oriented therapy was of marginal importance . . . [and because] medical training emphasized the physiological basis of disease.” *Id.* at 291-92.

treatment,¹¹⁹ both used at Pilgrim State.¹²⁰ Electric shock therapy, used to treat schizophrenia and mood disorders, also became a staple in the Long Island state mental hospitals, with its use at Pilgrim State beginning in 1940.¹²¹ There is also evidence that electric shock therapy was used both at Kings Park and Central Islip State Hospital in the 1950s and 1960s.¹²² The most controversial—and pernicious—medical therapy of all was the neurosurgical procedure called the lobotomy. Again, there is evidence that lobotomies were performed in all four of the Long Island state hospitals, with the largest number at Pilgrim State.¹²³ The first pre-frontal lobotomies were done at Pilgrim State in 1946, and by 1959, as many as 1,000 to 2,000 lobotomies had been performed there, most of them in the central medical building

¹¹⁹ BEAM, *supra* note 33, at 79. Metrazol shock was the precursor to electric shock; both caused patients to go into convulsions. *Id.* By the middle 1930s, Metrazol treatment had spread throughout European and American asylums, although it too had terrible side effects. WHITAKER, *supra* note 22, at 92. “About a minute after the injection, the patient would arch into a convulsion so severe it could fracture bones, tear muscles, and loosen teeth. In 1939, the New York State Psychiatric Institute found that 43 percent of state hospital patients treated with Metrazol had suffered spinal fractures.” *Id.* at 93. After the first treatment patients would “invariably resist another, and have to be forcibly treated.” *Id.* at 94. Seventy percent of the nation’s hospitals were using Metrazol treatment by 1939, most receiving multiple injections, “and being done so against their will.” *Id.* at 96.

¹²⁰ *Pilgrim State Hospital*, OPACITY, http://www.opacity.us/site23_pilgrim_state_hospital.htm (last visited Nov. 13, 2018). The first patient injected with large doses of insulin at Pilgrim State was in 1936. *Id.* Insulin coma was discovered by accident when the Viennese psychiatrist Dr. Manfred Joshua Sakel “unintentionally gave a diabetic mental patient an overdose of insulin, lowering her blood sugar” and throwing her into a coma; when she regained consciousness, she felt much better. BEAM, *supra* note 33, at 78. Apparently patients would be left in deep comas for twenty minutes to two hours, and then brought back to consciousness with glucose (sometimes this coma was induced three times a week). WHITAKER, *supra* note 22, at 87, 90. When “patients emerged from the coma, they would act in needy, infantile ways. They would plaintively ask the surrounding nurses and doctors who they were, often reaching out, . . . to hold their nurse’s hands or to hang on to their arms. They would suck their thumbs, frequently call out for their mommies, ‘behaving as if struggling for life.’” *Id.* at 87, 89. Insulin-coma therapy was a common treatment for schizophrenics into the mid-1950s; it not only had a high mortality rate (5% of all patients treated died from it), but those who were successfully treated, and discharged, did not fare well with more than 80% needing to be readmitted. *Id.* at 90.

¹²¹ *Pilgrim State Hospital*, *supra* note 120. Electric shock therapy originated in Italy in 1938; two doctors, Ugo “Cerletti and [Lucio] Bini had seen hogs killed at a Rome slaughterhouse after being stunned with electric current,” and they tried the method on schizophrenics, with the production of classic epileptic convulsions. BEAM, *supra* note 33, at 80.

¹²² POLASKI, *supra* note 5, at 59-60.

¹²³ *Id.* at 60.

#23.¹²⁴ This was the darker side of the Long Island psychiatric hospitals, although the psychosurgeries are no longer performed in the state hospitals, having been replaced by drug therapy.¹²⁵ By the 1950s, the chemical revolution had begun.

Chlorpromazine, marketed as Thorazine, was the first “antipsychotic” medication, introduced into the United States market in 1954.¹²⁶ In the early days of Thorazine, it was seen as a “pill that hindered brain function, much in the same manner the lobotomy did.”¹²⁷ Patients who had been “severely agitated, anxious and belligerent became immobile, wax-like, quiet, relaxed, and emotionally indifferent”;¹²⁸ early on it was also noted on that Chlorpromazine “frequently induced Parkinson’s disease symptoms—the shuffling gait, the masklike visage, and even the drooling.”¹²⁹ However, these side effects notwithstanding, Chlorpromazine was soon regarded as a miracle pill, “one of the most significant advances in the history of psychiatric therapy”; it would make it possible “for family doctors to treat mental illness in their offices, with ‘only the

¹²⁴ *Pilgrim State Hospital*, *supra* note 120. There was a television report on lobotomies, shot at Pilgrim State in 1992, hosted by Tom Jarriel of ABC’s 20/20 in which he presented the history of the procedure, as well as interviews of some of the remaining one hundred lobotomy patients still living in Pilgrim State at that time. *See Pilgrim Psych Center 1992*, YOUTUBE (Sept. 20, 2011), <http://www.youtube.com/watch?v=WDoYJcaNlrA> (airing in 1992; originally broadcasted by ABC on 20/20). Lobotomies had profound effects on the patient, and were seen to be a “surgically induced childhood.” WHITAKER, *supra* note 22, at 122 (internal quotation marks omitted). While many patients were allowed to go home, they suffered from extreme lethargy and lack of initiative; getting them dressed and bathed could be a chore. *Id.* at 123.

Those who had inventive imaginations before surgery would become “dull and uninspired” . . . [since it is the frontal lobe that] gives us consciousness of the self, that allows us to experience ourselves and to project ourselves into the past, present, and future . . . [the disconnection of the frontal lobes] freed the mentally ill from “disagreeable self-consciousness.” It liberated them from “all sense of responsibility and of anxious self-questioning as to the ethical rightness of their conduct.”

Id. at 126-27.

¹²⁵ POLASKI, *supra* note 5, at 60. “Psychosurgery is no longer being used to treat patients in the State’s mental hospitals, having been replaced by drug therapies.” *Id.*

¹²⁶ WHITAKER, *supra* note 22, at 141 (internal quotation marks omitted). Lithium, the first mood-influencing drug, had been introduced in 1949 to manage manic depression. PORTER, *supra* note 17, at 205.

¹²⁷ WHITAKER, *supra* note 22, at 141.

¹²⁸ *Id.* at 144 (internal quotation marks omitted).

¹²⁹ *Id.*

most seriously disturbed' needing to be hospitalized."¹³⁰ In 1963, President John Kennedy unveiled a new plan for the care of the nation's mentally ill, one that would replace the state hospitals—now relics from a shameful past—to decentralized, neighborhood clinics.¹³¹ At the heart of Kennedy's vision was a belief in the power of the new neuroleptic drugs to make "it possible for most of the mentally ill to be successfully and quickly treated in their own communities and returned to a useful place in society."¹³² In a Joint Commission on Mental Illness and Mental Health report given to Kennedy two years before he announced his new plan, the drugs were described "as moral treatment in pill form."¹³³

As the new drugs enjoyed phenomenal success,¹³⁴ psychiatrists in Europe and in America became increasingly critical of mental institutions, taking the view that the asylum's rigid segregation of the sane and the insane no longer made sense.¹³⁵ In what came to be labeled the "anti-psychiatry" movement in the 1960s and 1970s, social critics came to not only expose the prisonlike qualities of mental hospitals, but also to question the existence of mental illness itself.¹³⁶ Just as President Kennedy had urged, the burgeoning patients' rights movement and the anti-psychiatry movement lobbied for de-institutionalization, and within a very short time, patient populations

¹³⁰ *Id.* at 152 (internal quotation marks omitted). In 1955, the New York Times medical writer declared: "Today, there can be little doubt that, in the use of these and other drugs under study, research has developed new tools that promise to revolutionize the treatment of certain mental illnesses." *Id.* at 153.

¹³¹ WHITAKER, *supra* note 22, at 155-56.

¹³² *Id.* at 156 (internal quotation marks omitted).

¹³³ *Id.*

¹³⁴ PORTER, *supra* note 17, at 206. Diazepam, marketed as the tranquilizer Valium, "became the world's most widely prescribed medication in the 1960s; by 1970 one American woman in five was using minor tranquilizers; and by 1980 American physicians were writing ten million prescriptions a year for anti-depressants alone, mostly 'tricyclics' like Imipramine." *Id.* Prozac, a drug that raises serotonin level, was introduced in 1987, and within five years, eight million people had taken it. *Id.*

¹³⁵ *Id.* at 207-08.

¹³⁶ *Id.* at 209-10 (internal quotation marks omitted). Some of the seminal books included Thomas Szasz's books, *THE MYTH OF MENTAL ILLNESS* (1961) and *THE MANUFACTURE OF MADNESS* (1970) and Erving Goffman's *ASYLUMS* (1961). PORTER, *supra* note 17, at 210. Ronald Laing established a community "in a working-class East London neighbourhood where residents and psychiatrists lived under the same roof. The latter were to 'assist' patients in living through the full-scale regression involved in schizophrenia." *Id.* at 210-11.

in mental hospitals rapidly declined.¹³⁷ This trend was mirrored in the shrinking of patient populations in the Long Island mental institutions. In 1955, Central Islip State Hospital had over 10,000 patients; Kings Park's population had also soared in the middle 1950s, with over 9,300 patients, but both hospitals experienced a steady decline in the 1970s and 1980s.¹³⁸ The New York State Office of Mental Health finally arranged to close them both, and the few remaining patients from Kings Park and Central Islip were transferred to Pilgrim State.¹³⁹ Pilgrim State, with its 13,875 patients and over 4,000 employees in 1954, laid claim to being the world's largest mental hospital, but it too experienced a decline in population.¹⁴⁰ The farm colonies of Long Island had come to an ignoble end.

The rest of their history is one of abandonment, vandalism, and demolition.¹⁴¹ When the Kings Park and Central Islip State Hospitals closed in the late 1990s, developers moved in like vultures.¹⁴² Part of

¹³⁷ *Id.* at 211. Deinstitutionalization occurred in Europe as well. In Britain, for example, there had been 150,000 patients in mental institutions; by the 1980s, the population was reduced to just one-fifth of that number. *Id.*

¹³⁸ *Central Islip State Hospital*, ASYLUM PROJECTS, http://www.asylumprojects.org/index.php?title=Central_Islip_State_Hospital (last updated Dec. 30, 2016); *Kings Park State Hospital*, ASYLUM PROJECTS, http://www.asylumprojects.org/index.php?title=Kings_Park_State_Hospital (last updated June 19, 2016).

¹³⁹ *Kings Park State Hospital*, *supra* note 138. Kings Park ended its 111-year run with its closing. *Id.* During the Second World War, the Army took over Edgewood for battle-worn soldiers, and when it was returned to the state in 1946, Edgewood was used as a hospital for mental patients who had contracted tuberculosis; it was closed in 1971. *Edgewood State Hospital*, ASYLUM PROJECTS, http://www.asylumprojects.org/index.php?title=Edgewood_State_Hospital (last updated Sept. 4, 2017). In 1989, Edgewood, the tallest building in Long Island, was demolished. *Id.*; *see also Edgewood Demolition Pilgrim State Hospital*, YOUTUBE (Nov. 16, 2008), <http://www.youtube.com/watch?v=nI4kZXf9aV8> (showing footage of the building's demolition).

¹⁴⁰ *Pilgrim State Hospital*, ASYLUM PROJECTS, http://www.asylumprojects.org/index.php?title=Pilgrim_State_Hospital (last updated Mar. 21, 2016).

¹⁴¹ Razing these old institutions is very expensive. The demolition of fourteen buildings at Kings Park that were causing safety issues cost \$14 million. Stacey Altherr, *Plans to Demolish 14 Buildings at Kings Park Site*, NEWSDAY (June 3, 2009), <http://www.newsday.com/long-island/politics/plans-to-demolish-14-buildings-at-kings-park-site-1.1240077>. State parks department officials pointed out that the buildings all “contain lead and asbestos as well as five miles of underground steam tunnels containing asbestos, an ash landfill and on-site burial of construction debris.” *Id.*

¹⁴² *See* Bruce Lambert, *Long Island Debates Future of Psychiatric Hospitals*, N.Y. TIMES (Nov. 5, 1996), <http://www.nytimes.com/1996/11/05/nyregion/long-island-debates-future-of-psychiatric-hospitals.html?pagewanted=all&src=pm> (“These are tremendous assets and opportunities, and we don’t want to blow it by letting them fall into wrack and ruin or by developing them improperly.” (internal quotation marks omitted)). One problem was what to do with the “all-but-forgotten cemeteries at three hospitals[:] [a]bout 24,000 indigent patients

the hospital grounds at Central Islip, with a campus of over 1,000 acres, was dedicated by New York for the state and federal court complex, and a private college, the New York Institute of Technology, purchased another large portion, taking over the main administration buildings to form a nucleus for its school.¹⁴³ Other private entities purchased parcels and put up new facilities on the site of the former Central Islip State Hospital: Touro Law Center; a condo development; an apartment complex for the elderly, an office building, a minor league baseball park, a strip shopping mall, complete with Target and Home Depot, and a now defunct cheese warehouse. Kings Park, perhaps the most bucolic of the farm colony locations, was at first turned into a park, but only recently were funds raised to demolish the remaining buildings.¹⁴⁴ Pilgrim State Hospital is the hold-out; the massive eight-story medical building still looms large from the Sunken Meadow Parkway, a dark brooding presence from another era.¹⁴⁵ Pilgrim State is now a shadow of itself. From a patient population of nearly 14,000 in 1954, it now offers four out-patient programs, and has 410 in-patient beds.¹⁴⁶ And Pilgrim State too is

are buried there, most without visible markers.” *Id.* (Author’s note: It is unclear where that figure came from).

¹⁴³ *Central Islip State Hospital*, *supra* note 138.

¹⁴⁴ Lawrence Downes, *Erasing the Past at the Ghost Hospital*, N.Y. TIMES (Aug. 4, 2012), <http://www.nytimes.com/2012/08/05/opinion/sunday/erasing-the-past-at-the-ghost-hospital.html>. Downes noted that the condition of the Kings Park cemetery, much smaller in scope than Central Islip’s, is in a state of worse repair:

And the memory of the patients who lived and died there is all but lost. Hundreds of them lie today in a potter’s field at the far edge of the property. Parks workers had trouble remembering where it was. But they found it, up a dirt road behind a locked gate: a grassy meadow scattered with a few stone slabs bearing numbers, not names.

Id. Downes also found the remaining buildings in a terrible state of repair:

Nearly all of what remains at the site is abandoned, including Building 93, a tower that looms over the grounds like a horror-movie hospital. Doors and windows are covered with plywood; weeds sag on brickwork. Graffiti defaces the ruins inside and out; thieves have stripped them for scrap metal, sawing off pipes and gutters and smashing electrical switches with rocks to pick out the copper like crab meat.

Id.

¹⁴⁵ See POLASKI, *supra* note 5, at 13 (“After being excessed as a mental facility in the 1970s, they were renovated to function as a state prison in the 1980s. When that plan changed because of local opposition, they were again renovated . . . in the late 1990s [for a limited number of] long term mental patients . . .”).

¹⁴⁶ *Pilgrim Psychiatric Center*, OFF. MENTAL HEALTH (Apr. 1, 2012), <https://www.omh.ny.gov/omhweb/facilities/pgpc/facility.htm>.

slowly disappearing; many of the buildings have been razed, and most of its campus sold to a developer.¹⁴⁷

All of this demolition and development on the site of Long Island's former farm colony hospitals reflect social and economic realities: land uses change over time. There will come a time when the only evidence of this chapter in the history of New York's care for the mentally ill will be the cemeteries of her former asylums. Whoever our silent neighbors to the south may be, their numbered concrete markers will remain the only trace of their lives—lives once lived inside imposing brick walls that are no longer standing. The same thing has happened throughout the United States at the sites of former state mental hospitals: the brick walls have been torn down, and the old asylum cemeteries are all that remain.

We are now going to move on to the history of the American cemetery, to see where the Central Islip State Hospital cemetery fits in. This next chapter of history is directly related to the issues explored in the Part III of this essay: what are our duties generally to the dead, and more specifically, to those buried in abandoned or forgotten asylum cemeteries.

II. THE HISTORY OF THE AMERICAN CEMETERY/WHERE THE CENTRAL ISLIP STATE HOSPITAL CEMETERY FITS IN

In a conversation with Rabbi Melvyn Lerer, who has cared for the Jewish patients at the farm colony hospitals on Long Island from the 1970s to the present, he expressed dismay that sometimes in the hospital cemeteries he witnessed the bodies of deceased mental patients being “put into the ground wrapped in a shroud only.”¹⁴⁸ His dismay, while it may be shared by many Americans in the early twenty-first century, would not have been understood in the centuries before the eighteenth. In Europe, only the very rich were buried in coffins.¹⁴⁹ Being buried in a shroud was commonplace.¹⁵⁰ We must

¹⁴⁷ See POLASKI, *supra* note 5, at 150 (noting that in 2003, fifty-seven buildings on Pilgrim State's campus were demolished).

¹⁴⁸ This statement was made personally to the author; thus evidence of this practice is merely anecdotal. *But see Question 11.6.5: Death and Burial: What are Jewish Funeral Customs?*, SOC.CULTURE.JEWISH NEWSGROUPS, <https://mljewish.org/S.C.J/faq/11-06-05.html> (last visited Nov. 13, 2018).

¹⁴⁹ JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* 146 (1998).

¹⁵⁰ See CHRISTOPHER DANIELL, *DEATH AND BURIAL IN MEDIEVAL ENGLAND 1066-1550* 43 (1997) (noting that in the 1500s shrouding was usually performed by women). The body

understand Rabbi Lerer's distress at the casual burial of the mental patients on Long Island in historical context. Burial practices vary widely from culture to culture, over geographical distances and over time. Even when we are talking about something as simple as whether to wrap a corpse in a shroud, or to put it in a box—and if the latter, what kind of box—the answers to these practical problems are contingent upon where those questions are asked, by whom, and when.¹⁵¹

And these practical problems about the disposal of the dead have been around for a long time. On the planet today, there are approximately 6.9 billion living people; of the people who have died throughout the history of the world, there are approximately 107 billion souls.¹⁵² These are staggering statistics. Even in an era of overpopulation, the number of people living on the planet today represents

would normally be kept at home and “la[id] on a bed with a lit candle at the head and the shroud [would be] sewn along the cent[er] and would eventually cover the whole body.” *Id.* at 42, 43. “In an English example of a stained-glass burial scene from Leicester the shroud was a large piece of cloth, put over the head and then tied at the feet. In the middle of the chest was a small cross.” *Id.* at 43. For the vast majority of the population, a simple shroud over a naked body sufficed, but if you were an important person, such as a judge or a bishop, you might be borne in your formal dress; this “was only appropriate for the highest ranks of society, presumably as their status in Heaven required.” *Id.* at 156. Shrouds are still very much a part of the burial paraphernalia—and growing in importance with the green burial movement. One manufacturer, the Connecticut Casket Company in Willimantic, CT, uses only New England kiln-dried eastern white pine for their coffins, and if you are really into an economical and green burial, their least expensive product is simple green trundle, complete with a muslin, double hemmed burial shroud. *Green Trundle and Shroud*. CONN. CASKET COMPANY, <http://www.connecticutcasketcompany.com/portfolio/green-trundle-and-shroud/> (last visited Nov. 13, 2018). This option is the most economical and provides the lowest impact option for green or natural burial cemeteries. The shrouded method of burial is still commonly used in, but not limited to, Muslim, Hindu, and Native American cultures. *Id.*

¹⁵¹ These days, you can get yourself buried in a cardboard box, known as “nonwood caskets.” Cremation Products sells a basic, corrugated cardboard container that can support 450 pounds, although it is advertised as a “Cremation Container/Tray”; they also have a cardboard “Airport Transport Container/Tray.” See CREMATION PRODUCTS, <http://www.cremationproductsinc.com/> (last visited Nov. 13, 2018). Another economical alternative to a wood or metal casket are cardboard coffins manufactured by Eternity International, “composed of all natural substances with elegant wood grain printed on the outside,” with a faux cherry, pine, or plain finish. *Eternity Cardboard Casket*, ETERNITY INT’L, <http://www.eeternity.com/> (last visited Nov. 13, 2018). Eternity points out that rental caskets are expensive, and that the deceased has to be removed after the funeral service; “[t]he same casket may have been used hundreds of times. Cremation boxes offer no dignity at all, and cremation caskets contain toxic materials (plastic, glue, metal, etc.).” *Id.*

¹⁵² Carl Haub, *How Many People have Ever Lived on Earth?*, PRB (Oct. 2011), <http://www.prb.org/Articles/2002/HowManyPeopleHaveEverLivedonEarth.aspx>.

only about six percent of all of those who have ever lived before.¹⁵³ Starting with the premise that dead bodies must be disposed of, where *are* all those remains of the 107 billion people who both lived and died

¹⁵³ Burying the dead will become more and more problematic as the population of the planet grows. The United Nations Population Division issued a report on March 13, 2007, stating:

[T]he world population will likely increase by 2.5 billion over the next forty-three years, passing from the current 6.7 billion to 9.2 billion in 2050. This increase is equivalent to the total size of the world population in 1950, and it will be absorbed mostly by the less developed regions, whose population is projected to rise from 5.4 billion in 2007 to 7.9 billion in 2050.

THOMAS L. FRIEDMAN, *HOT, FLAT AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA* 28 (2008) (internal quotation marks omitted). We may have to resort to sending cremains out into space, or placing them beneath the sea. It is now possible to send a “symbolic portion of cremated remains” into space, although they return to earth. CELESTIS, <http://www.celestis.com> (last visited Nov. 13, 2018). It is dubbed a “final journey into celestial infinity.” *The Legacy Flight: Frederick A. Miller 1918-2005*, CELESTIS, <https://www.celestis.com/participants-testimonials/frederick-a-miller/> (last visited Nov. 13, 2018). It is possible to have your loved one’s cremains mixed into a “reef ball,” a hollow, concrete module, resembling an igloo with a dozen holes punched in it; the reef ball now serves to bolster artificial reefs along the ravaged reefs off the eastern coast of United States. MARK HARRIS, *GRAVE MATTERS: A JOURNEY THROUGH THE MODERN FUNERAL INDUSTRY TO A NATURAL WAY OF BURIAL* 88 (2007). Reef balls are “sunk onto one of more than a dozen existing artificial reefs in the Atlantic Ocean and [the] Gulf of Mexico,” creating a habitat for marine life and allowing for a unique (and environmentally helpful) burial at sea. *Id.* at 101-02. “Most castings take place in Sarasota[,]” and the cost is “[d]etermined by the size of the reef ball”; the largest is the Aquarius at \$4,995, and the smallest runs around \$1,000. *Id.* at 102. The website of Eternal Reefs, located in Decatur Georgia, quotes this testimonial:

What a wonderful idea! Both my wife and I have decided to be cremated when we die and to have our ashes placed into a Reef Ball is just icing on the cake. The idea of our remains helping to create new habitat for fish/wildlife fills me with joy. We both love the outdoors and are concerned about environmental and conservation issues so this fits our ideals perfectly.

Reef Ball Foundation, ETERNAL REEFS, <http://www.eternalreefs.com/about/foundation.html> (last visited Nov. 13, 2018). Other creative modes of disposing of bodies may be developed. A few years ago, a Swedish town made headlines when it claimed that it was going to try to freeze dry its dead bodies into brittle, compostable remains using liquid nitrogen. Michael Dibdin, *Meat and Mind: Michael Dibdin Discovers Gruesome Truths About Dead Bodies in Stiff* by Mary Roach, *GUARDIAN* (Jul. 26, 2003), <http://www.guardian.co.uk/books/2003/jul/26/featuresreviews.guardianreview6?INTCMP=SRCH>. And then there’s the 1973 SF film *Soylent Green*, *IMDB*, <http://www.imdb.com/title/tt0070723/> (last visited Nov. 13, 2018).

Det. Thorn: It’s people. Soylent Green is made out of people. They’re making our food out of people. Next thing they’ll be breeding us like cattle for food. You’ve gotta tell them. You’ve gotta tell them!

Hatcher: I promise, Tiger. I promise. I’ll tell the exchange.

Det. Thorn: You tell everybody. Listen to me, Hatcher. You’ve gotta tell them! Soylent Green is people! We’ve gotta stop them somehow!

Soylent Green, QUOTES, <https://www.quotes.net/mquote/88965> (last visited Nov. 13, 2018).

before us? If we counted up all of the people who are buried in what we deem traditional Northern American cemeteries, complete with carved stone commemorations of name, birth and death date, and perhaps some accompanying sentiment, what percentage of the 107 billion dead would be represented? My guess is: very few.¹⁵⁴

Rabbi's Lerer's distress over the use of only a shroud to wrap up his patients, for example, reflects the time-honored American preference for a coffin, a wooden box shaped to fit the body of the deceased.¹⁵⁵ Before the 1880s, undertaking was an informal,

¹⁵⁴ War and plague often resulted in non-burial of the dead. During the Crusades, for example, it was reported that they "heaped up the bodies of Turks and 'evaporated by means of fire' for the pragmatic reason that 'putrefying in the open air, they should pour contagion on the flagging atmosphere.'" DANIELL, *supra* note 150, at 107 (quoting Stevenson 1991: Section 369). Individual burials were also luxuries that could be ill afforded during times of plague or pestilence. When the Black Plague ravaged London, a plaque was erected at Spittle Croft which read: "A great plague raging in the year of our Lord 1349, this church was consecrated; wherein, and within the bounds of the present monastery, were buried more than 50,000 bodies of the dead, besides many others thence to the present time, whose souls God have mercy upon. Amen." *Id.* at 145. Many folklorists believe the nursery rhyme "Ring Around Rosie" had its origins in the disposal of dead bodies during the Great Plague of London in 1665: Ring around the rosy. A pocketful of posies. "Ashes, Ashes." We all fall down! "Ashes, Ashes" is said to refer to the burning of bodies, which began at that time. *What's the Story Behind the Song "Ring Around the Rosie"*, YAHOO! ANSWERS, <https://answers.yahoo.com/question/index?qid=20061107190900AA8fW6O> (last visited Nov. 13, 2018). In our own country, John M. Barry describes the piling up of bodies in Philadelphia during the 1918 flu epidemic that killed as many as one-hundred million people worldwide:

The city morgue had room for thirty-six bodies. Two hundred were stacked there. The stench was terrible; doors and windows were thrown open. No more bodies could fit. Bodies lay in homes where they died, as they died, often with bloody liquid seeping from the nostrils or mouths. Families covered the bodies in ice; even so the bodies began to putrefy and stink . . . Corpses were wrapped in sheets, pushed into corners, left there sometimes for days, the horror of it sinking in deeper each hour, people too sick to cook for themselves, too sick to clean themselves, too sick to move the corpse off the bed, lying alive on the same bed with the corpse. The dead lay there for days, while the living lived with them, were horrified by them, and perhaps most horribly, became accustomed to them.

JOHN M. BARRY, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY* 223-24 (2004). Eventually, the city opened supplementary morgues, and graves were dug, sometimes by family members, and sometimes by the city:

The city and archdiocese turned to construction equipment, using steam shovels to dig trenches for mass graves. . . . No one could look at the trucks and carts carrying bodies—bodies wrapped in cloth stacked loosely on other bodies wrapped in cloth, arms and legs protruding, bodies heading for cemeteries to be buried in trenches

Id. at 327-28.

¹⁵⁵ JAMES J. FARRELL, *INVENTING THE AMERICAN WAY OF DEATH, 1830-1920* 169 (1980).

unorganized enterprise, and when a death occurred, usually a cabinetmaker or furniture dealer would provide a coffin made-to-order, a simple six-sided wooden box with a hinged lid.¹⁵⁶ As the nineteenth century progressed, undertakers began to perform more and more of the services of the funeral, including furnishing ready-made, polished coffins for four to ten dollars.¹⁵⁷ The metal casket was invented in the 1870s,¹⁵⁸ and after the Civil War, many undertakers began to rely on burial case manufacturers for the coffins and caskets they sold, losing control of the price of the containers for the dead.¹⁵⁹ Coffin and casket designers “soared to marvelous heights. They experimented with glass, cement, celluloid, papier mâché, India rubber; they invented Rube Goldberg contraptions called ‘life signals’—complicated arrangements of wires and bells designed to set off an alarm if the occupant of the coffin would have inadvertently been buried alive.”¹⁶⁰ Metal caskets, however, won out; they were

¹⁵⁶ *Id.* at 147.

¹⁵⁷ *Id.* at 148. The undertaker also added a special box to his wagon to make a hearse, and went out on service calls, acquiring the skills of corpse preservation. *Id.* Sometimes the coffin/cabinetmaker would be asked to coordinate his delivery with the grave-digging sexton, the livery stable owner who supplied the horse and cart to transport the coffin, and the minister who would preside over the funeral; this “woodworker [would] . . . ‘undertake’ all those arrangements as a regular part of his coffin-making business (for an extra fee),” and the term “undertaker” came into being. HARRIS, *supra* note 153, at 130.

¹⁵⁸ Modern day caskets had their origins in the Victorian era. SCHLERETH, *supra* note 64, at 290-91. Coffins, which had been “plain wooden, roughly human-shaped box[es were] redefined as ‘casket[s],’ a term [that] original[ly] mean[t] . . . a container for precious objects.” *Id.* Women kept their jewels in caskets, and “*The Young People’s Casket* was a popular children’s [magazine] of short literary [pieces].” *Id.* Similarly, the corpse was now regarded as a precious object, enshrined in an ornate, cushioned container; more opulent caskets had plate-glass tops “through which mourners could view the body. Metal caskets came guaranteed not to leak once sealed.” *Id.* The first metal coffins came from stove manufacturers, from the “same factories that produced their staple cooking/heating ware.” HARRIS, *supra* note 153, at 130. Metal caskets had the advantage of being standardized, made by machines, and could thus be produced “en masse like any other consumer commodity being churned out in the emerging industrial age—and was. For the coffin-making woodworker, the appearance of the mass-produced metal coffin heralded the gradual decline in his trade of single-order, handcrafted funeral boxes and the corner coffin shop where he worked.” *Id.* at 130-31.

¹⁵⁹ The Stein Manufacturing Company of Rochester, New York, began producing caskets in the early 1870s, and sponsored a lavish display of caskets in 1876 at the Philadelphia Centennial Exposition in order to stimulate consumer demand for the product. FARRELL, *supra* note 155, at 148.

¹⁶⁰ MITFORD, *supra* note 149. Many Americans “feared premature burial almost as much as they feared other horrors of the grave. Most writers on the subject of premature burial suggested either sure signs of death or adoption of the Germany mortuary system, whereby bodies lay in mortuary chambers until death was certain.” FARRELL, *supra* note 155, at 163. One of the virtues of embalming was that it prevented burial alive. *Id.*

solid, durable, and had “eternal” qualities.¹⁶¹ Caskets served more functions than coffins; they protected and preserved the corpse.¹⁶² The new heavy metal caskets had elaborate locks and lids, designed to protect against the “resurrectionalists” or grave robbers.¹⁶³ Manufacturers also produced air-sealed metal caskets to preserve the body, not only for transportation, but after burial.¹⁶⁴ In an advertisement, the “Montross Sanitary Casket” was described as “indestructible, and impervious to the ravages of the earth . . . hermetically sealed, air-tight, water, vermin, and germ-proof,” insuring a “lasting, humane tribute to the dead.”¹⁶⁵

But if we cross the Atlantic at the same time, with that same hermetically sealed, air-tight, water, vermin and germ-proof box, and consider putting it into an English cemetery, we find ourselves in the midst of another historically contingent context—one in which judges debated whether the common law right to burial included the right to be buried in such a fine box. This question was raised in an 1820 English decision entitled (you cannot make this up), *Gilbert v. Buzzard*.¹⁶⁶ *Gilbert v. Buzzard* tells us a lot about the box, as well as a lot about the right of sepulture, or burial, at common law. In *Gilbert v. Buzzard*, Mr. Gilbert wanted to bury his wife in a newly patented, locked, iron casket to stave off grave robbers—a precursor of the metal casket to come.¹⁶⁷ The church wardens, among them Mr. Buzzard, refused to allow him to do so, following a resolution by the parish

¹⁶¹ MITFORD, *supra* note 149, at 147 (internal quotation marks omitted). With the rise of medical schools, and their need for cadavers for dissection—all in the name of progress and advancement of medical training and knowledge—bodies were “snatched” from graves by a class of men, often hired by individuals within the medical community, known as “resurrectionalists.” GARY LADERMAN, *THE SACRED REMAINS: AMERICAN ATTITUDES TOWARDS DEATH, 1799-1883* 82 (1996). Most of the bodies came from executed criminals, the poor, and those who had no family or friends to tend to them; “[t]he idea of robbing a grave for money, coupled with the imagined, horrid scene of the dead body on a table surrounded by strangers who cut into it and destroyed its integrity, was repulsive to many.” *Id.*

¹⁶² FARRELL, *supra* note 155, at 172.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (internal quotation marks omitted). These claims complemented the growing practice of embalming, which also sought to preserve the body from natural dissolution; “[i]t also appealed to the same sanitary and scientific considerations. Like the new name, the preservative function of the casket also indicated a broader change in attitudes towards death, as the body challenging the soul as the center of concern.” *Id.*

¹⁶⁶ (1820) 161 Eng. Rep. 1342, 1 Hagg. Con. 348.

¹⁶⁷ *Id.* at 1342.

vestry prohibiting the use of iron caskets.¹⁶⁸ The church wardens argued that if parishioners were permitted to bury their dead in iron coffins made sturdy enough to ward off decay, there would soon be no burial space left.¹⁶⁹ The secular courts refused to intervene, delineating the jurisdiction of the common law to the right of sepulture only, and the jurisdiction of the church and its ecclesiastical courts to the mode of burial.¹⁷⁰ In *Gilbert v. Buzzard*, Lord Stowell wrote:

The rule of law which says that a man has the right to be buried in his own churchyard is to be found most certainly in many of our authoritative text writers; but it is not quite so easy to find the rule which gives him a right of burying a large chest or trunk in company of himself. That is no part of the original and absolute right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner.¹⁷¹

Lord Stowell also approved of the church's attempts to prohibit the use of iron caskets on environmental grounds: "the dissolution of bodies would be accelerated, and the dangerous virulence of the fermentation disarmed by a speedy absorption of the noxious particles into the surrounding soil."¹⁷² The judges ordered the church to set a roster of fees for extraordinary burial practices, *e.g.*, those involving iron caskets, and that was how the case was resolved: Mr. Gilbert could bury his wife in an iron box, but he had to pay for it.¹⁷³

What then was the scope of the English common law right of sepulture? Not as broad as one might think. The general view in Europe was that the burial of human bodies was an impermanent state of affairs; English common law followed suit, also regarding burial as a "temporary appropriation of space."¹⁷⁴ An individual's right of

¹⁶⁸ Philip Jones, *Gilbert v. Buzzard; Funerals and Fees*, ECCLESIASTICAL L. (June 14, 2012), <http://ecclesiasticallaw.wordpress.com/2012/06/14/gilbert-v-buzzard-funerals-and-fees/>.

¹⁶⁹ MITFORD, *supra* note 149.

¹⁷⁰ *Id.*

¹⁷¹ *Gilbert*, 161 Eng. Rep. at 1348.

¹⁷² MITFORD, *supra* note 149 (quoting *Gilbert*, 161 Eng. Rep. at 1347) (internal quotation marks omitted).

¹⁷³ Jones, *supra* note 168.

¹⁷⁴ C. Allen Shaffer, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 CAP. U. L. REV. 479, 486 (2003). "Once buried, there was no guarantee that the body would remain in the same church or churchyard for ever," particularly for those

sepulture eventually disappeared when the body decomposed and ceased to occupy space, a principle that made sense in a country where land was scarce.¹⁷⁵ In the early years, even with their penchant for the use of coffins, Americans too operated on the premise that the right to burial was impermanent, a useful assumption in the fledgling towns and cities where land was scarce, particularly when the numbers of dead swelled from the Revolutionary War, and from deadly diseases such as yellow fever and smallpox.¹⁷⁶ Churchyards were often already full, and in some cemeteries, coffins were buried one on top of the other, often within a few inches of the ground's surface, and the graves became burial mounds, rising several feet above the ground.¹⁷⁷ Trinity Church in New York City is a case in point: by 1800, the Trinity graveyard held the remains of about 100,000 people.¹⁷⁸ Recycling the grave was not only accepted, but necessary.

corpses of individuals with saintly or political importance. DANIELL, *supra* note 150, at 93. A perfect example was the Anglo-Saxon cleric St. Cuthbert, whose body was "carried around the north of England, the outer limits of which were Lindisfarne, Yorkshire, the North Sea coast and the coast of the Irish Sea. Eventually the body settled in Durham, but even there the body was moved to different locations in the church." *Id.* at 93-94. There was a theory that the pagan Anglo-Saxons "brought the cremated remains of their ancestors over to England with them when they migrated." *Id.* at 94.

¹⁷⁵ Shaffer, *supra* note 174, at 486.

¹⁷⁶ MEG GREENE, *REST IN PEACE: A HISTORY OF AMERICAN CEMETERIES* 22-23 (2008).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 23. This view of the impermanence of the grave persists in Europe today. See Alex Mar, *Rent-a-Grave*, SLATE MAG. (Feb. 28, 2011), http://www.slate.com/articles/life/fait_hbased/2011/02/rentagrave.html (describing the chilling practices of Greek grave rentals, and subsequent exhumation within three years). Unless the family has the equivalent of \$200,000 to purchase a permanent grave, all graves in Greece are rented for a maximum of three years, and:

By law, once that time is up, a relative must appear at the gravesite to witness a cemetery worker (no priest is present) dig up the grave, exhume the body (often not fully decomposed), pry it from the coffin, and then collapse the bones into a container roughly the size of a shoebox for storage in a communal ossuary.

Id. In describing what happened to this family, whose parents had died in Greece, the closest living relative in Athens chose not to attend the exhumation, and "[a]s a result, my grandparents' remains were placed in a mass grave and dissolved with chemicals. Incredibly, this is not that uncommon. If no one shows up on the appointed date, or if you stop payment on the fee for the ossuary, the cemetery destroys the bones." *Id.* Italy and France also allow for exhumation and removal to the ossuary when necessary, but they allow more time for decomposition, and:

[D]on't share Greece's bear-witness-or-we-pull-the-trigger approach. In Sweden, after 25 years, the law requires that cemetery workers dig up the coffin, dig the grave even deeper, and then bury another casket in the earth above it. The United Kingdom, resistant to any disturbance to graves

It was not long, however, before Americans rejected the European view that the gravesite was impermanent.¹⁷⁹ Geographical conditions dictated the difference. Outside of the towns and cities of the Republic, the spaces were wide and open—there was plenty of land to dedicate in perpetuity to the dead.¹⁸⁰ The new premise that the grave is permanent gave rise to a body of law that is quite unique to America—that land could be “dedicated” in fee simple for use as a cemetery for the burial of the dead, and that an easement could then be created within that cemetery for an individual’s body, his heirs and assigns—both property interests that would last for a potentially infinite duration, unless either one of the interests was abandoned.¹⁸¹ This easement for burial—considered to be *in gross* because it did not benefit its holder in the use and enjoyment of any dominant estate—took over the common law right of sepulture that was explicated in *Gilbert v. Buzzard*.¹⁸² American law came to approach the issue of burial differently from the English: the deceased had a valuable property interest, an easement in gross, that ran to his heirs and assigns; it existed not for a short period of time, but permanently, and the mode of use of that burial easement was to be dictated not by any ecclesiastical courts, but by the contractual relations that the deceased entered into with the cemetery that owned the fee.¹⁸³ And the way things worked out: metal-lined caskets were by and large permitted.¹⁸⁴

under the Burial Act of 1857, is now trying a similar method—but only with remains that are more than 100 years old.

Id.

¹⁷⁹ Shaffer, *supra* note 174, at 486. American courts recognized this shift from the European view of the grave as impermanent. For example, in 1927 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.” *King v. Frame*, 216 N.W. 630, 633 (Iowa 1927).

¹⁸⁰ Shaffer, *supra* note 174, at 486.

¹⁸¹ *Id.* Behind the theory of dedication is the idea that the community owns the cemetery in some regard, and serves as the basis of many state statutes that transfer abandoned cemeteries to local officials in trust for the community. *Id.*

¹⁸² See generally *Gilbert v. Buzzard*, (1820) 161 Eng. Rep. 1342, 1 Hagg. Con. 348.

¹⁸³ Shaffer, *supra* note 174, at 486-87.

¹⁸⁴ HARRIS, *supra* note 153, at 131. As of 2007, “three-quarters of the nearly two million caskets sold [each] year [were] metal, [with] the vast majority of them [being] produced by three corporations.” *Id.*

In 1982, the Federal Trade Commission classified casket manufacturing as a concentrated industry with significant impediments to entry of new companies There are seven companies that stamp metal casket components . . . and less than a dozen manufacturers assemble well over

As we begin to examine the history of the American cemetery—the land where we inter those caskets—it will become apparent that how a society chooses to bury its dead reflects its attitudes towards death and dying.¹⁸⁵ The early Puritans are a perfect example.¹⁸⁶ They regarded the body as a mere temporary receptacle; only the immortal soul matters. The Puritan burial ground therefore served as a reminder of the fleeting nature of temporal life, the constant presence and inevitability of death, and the need to prepare the soul for the life in the hereafter.¹⁸⁷ Churchyard burials and ornamentation were rejected by the early Puritans, and the community burial grounds were a hodgepodge, with graves dug randomly, marked only with small wooden markers, and choked with weeds.¹⁸⁸ By the middle of the

90% of all metal caskets sold in the US. It is estimated that three companies produce more than 70% of all caskets sold annually.

The Casket Industry, CASKET & FUNERAL SUPPLY ASS'N AM., <http://www.cfsaa.org/about.php> (last visited Nov. 13, 2018).

¹⁸⁵ The burial practices of Native Americans are beyond the scope of this essay, although they are fascinating. The native people of the Plains, for example, had few sacred burial grounds; instead their most common form of burial was a scaffold, constructed of four upright poles, taller than human hands could reach, and beyond the height that any wild animal could jump. THOMAS E. MAILS, *THE MYSTIC WARRIORS OF THE PLAINS: THE CULTURE, ARTS, CRAFTS, AND RELIGION OF THE PLAINS INDIANS* 180 (1991). “A fresh buffalo skin, still moist, [would be] wrapped around the body, and [the body would then be] tightly bound . . . with thongs of rawhide from head to foot[.] [then] other robes would be soaked in water until soft, and then wrapped in layers around the body.” *Id.* All air would be excluded from the corpse. *Id.* On top of the poles, a raft-like platform was created to hold the body, and the body was laid on its back, its feet turned towards the rising sun. *Id.* A second method was the tree burial, often used in the winter by Indians living in the north. *Id.* The theory was to keep the body above the ground with no covering to separate it from the creator, and earth burials were avoided: “But the elevated scaffold or tree burial was preferred, since, as time and the elements decayed and eroded the body, it was free to return to where it had come from. ‘Each of the elements,’ they said, ‘absorbed a part.’” MAILS, *supra*. “Stationary tribes had scaffold cemeteries near the village. Others placed scaffolds at many places in the Plains. If there were holy burial grounds, few have come to light in Indian accounts.” *Id.* at 184.

¹⁸⁶ See GREENE, *supra* note 176, at 11 (“Colonists preferred isolated and unmarked grave sites to make it difficult for Native Americans to know how many settlers had been killed. Unmarked graves were less likely to be disturbed, and they required no care or protection.”).

¹⁸⁷ *Id.* at 13.

¹⁸⁸ *Id.* The Quakers had their own views about death that were reflected in a different set of burial customs. They usually referred to their graveyards as burying grounds, locating them next to the meeting house. CARMACK, *supra* note 12, at 191-92. Early colonial Quakers, known officially as the Religious Society of Friends, viewed death as the following:

[A]s the climax of life, a time that they welcomed rather than feared. Death was the opportunity to escape the harsh realities of the world. Quakers had little interest in the remains, and special committees of Friends handled funerals and burials. Mourning was considered vain and proud, as was wearing black at burials.

1600s, however, the Puritans began to employ cemetery art at their graves, with carved stones bearing doleful warnings to passersby that death was ever present.¹⁸⁹ *Fugit Hora* (Time flies) and *Memento mori* (Remember, you will die) were common inscriptions, and the stones were complemented with visual images obsessing on death: death heads, skulls, crossbones, skeletons, scythes, hourglasses, coffins—anything to illustrate graphically to the living that they should contemplate their own imminent death and decay.¹⁹⁰ Things softened a bit from the 1740s onward, with angelic faces with wings competing with the death heads on the gravestones, primarily due to the Great Awakening's insistence that death should be viewed as a joyful resurrection.¹⁹¹ The theology became more optimistic, with hints of a

Id. at 189-90. "Early Quaker burials were not marked. Between the 1820s and 1830s, Friends were allowed to use field stones to mark graves, inscribed with just the initials and years of death. *Id.* at 192. After the 1840s, low, plain carved stones were allowed with names and vital statistics only; the bodies were interred row by row as members died, and not in family plots. *Id.* Compared to the Quakers, the Irish were quite expressive. In the nineteenth century, Irish Catholics preferred to lay out their dead in the home bedroom where the deceased had once slept. SCHLERETH, *supra* note 64, at 292. The corpse would hold a crucifix or rosary, and the tradition of "waking" began; "[k]eening, drinking, mock marriages, and games took place in the home before the casket was escorted to the funeral Mass and burial. Merriment resumed after the mourners returned to the deceased's home." *Id.*

¹⁸⁹ GREENE, *supra* note 176, at 13.

¹⁹⁰ YALOM, *supra* note 12, at 14. The New England Puritans forced their children to memorize these cheery phrases: "As runs the *Glass* / Man's life doth pass. *Time* cuts down all / Both great and small. *Xerxes* the great did die / And so must you and I. *Youth* forward slips / Death soonest nips." *Id.*

¹⁹¹ *Id.* at 15. The Great Awakening was a religious revival movement that rejected established ritual and external authority in favor of more inward and personal sentiments. *Id.* This notion of resurrection differed for Catholics, for example, who believed that upon death, the individual would go to Heaven, Hell, Limbo, and for most, Purgatory, in anticipation of the Last Judgment when they would be reunited with their bodies. Penny Roberts, *Contesting Space: Burial Disputes in Sixteenth-Century France*, in *THE PLACE OF THE DEAD: DEATH AND REMEMBRANCE IN LATE MEDIEVAL AND EARLY MODERN EUROPE* 133 (Bruce Gordon & Peter Marshall eds., 2000). Movement between those locations could occur through the intercession of the prayers of the living, and cemeteries "were viewed as dormitories of the dead, awaiting the final wake-up call . . ." *Id.* In the fifteenth century, Purgatory came to dominate theology, religious practices, and the beliefs of ordinary people. DANIELL, *supra* note 150, at 11. Heaven and Hell were supposed to last for eternity, but Purgatory was for a previously undefined period which could be affected by money, or offering gifts to the church, this meant that a large number of poor, and socially insignificant, people would suffer in Purgatory without relief; hence a special day, All Souls Day, was reserved in early November when a Requiem Mass would be held for all souls in Purgatory. *Id.* at 12. "The belief that souls would eventually be released [from Purgatory] was a central part of medieval religion. Increasing amounts of energy, money and effort were devoted by the living to shorten the time their own souls, and those of others, spent in Purgatory. The living and the dead were therefore bonded together." *Id.* "In the purgatorial fires and torments the sinful soul would be cleansed of its venial sins and therefore be able to reach Heaven." *Id.* at 10.

benign reunion with God, and the iconography of the burial ground reflected that shift in intellectual stance.¹⁹²

As we move out of the colonial period, we can more or less group the types of places where the dead were buried: random, isolated places wherever the individual died on the frontier; family farms, sometimes in multi-family burial plots; churchyards,¹⁹³ and later on, for those who were poor, and sometimes criminal, potter's fields.¹⁹⁴ The "pioneer cemeteries" on the frontier were often unmarked and

¹⁹² YALOM, *supra* note 12, at 15-16. The angels began to predominate over the death heads in the 1730s and 1740s, and in the last two decades of the eighteenth century, stones began to sport secular urns and willows, all popularized in Europe by Enlightenment and French revolutionary thinkers. *Id.* at 16.

¹⁹³ GREENE, *supra* note 176, at 14. The churchyard cemeteries tended to be those of British colonists who were members of the Church of England, and their burial grounds did not emphasize the horrors of death, but focused more on honoring the dead, and "the hoped-for resurrection (rising from the dead) and life everlasting." *Id.*

¹⁹⁴ Shaffer, *supra* note 174, at 482. The term "potter's" field came from a passage in *Matthew 27:7* that described land of the same name outside the city walls of Jerusalem that was dedicated in biblical times for burial of the poor. A better explanation is given by the Word Detective:

[T]he term "potter's field" comes from the Bible, specifically the Gospel of Matthew. When Judas Iscariot was overcome with remorse for accepting thirty pieces of silver to betray Jesus, he returned the coins to the temple. The priests, however, could not accept "blood money" (money used to purchase the death of a person), so they used it to buy land on which to bury the poor and foreigners. The land they bought was rich in clay and had been owned by a pot-maker, so it was known henceforth as "potter's field."

Potter's Field, WORD DETECTIVE (June 2, 2009), <http://www.word-detective.com/2009/06/potters-field/>. The verse in full:

Then Judas, who betrayed him, seeing that he was condemned, repenting himself, brought back the thirty pieces of silver to the chief priests and ancients, . . . [s]aying: I have sinned in betraying innocent blood. But they said: What is that to us? look thou to it. . . . And casting down the pieces of silver in the temple, he departed: and went and hanged himself with a halter. . . . But the chief priests having taken the pieces of silver, said: It is not lawful to put them into the *corbona*, because it is the price of blood. . . . And after they had consulted together, they bought with them the potter's field, to be a burying place for strangers. . . . For this cause the field was called Haceldama, that is, The field of blood, even to this day.

Gospel According to Saint Matthew: Chapter 27, DUOAY-RHEIMS BIBLE, <http://www.drbo.org/chapter/47027.htm> (last visited Nov. 13, 2018). "Few potter's fields existed in [this country] before the nineteenth century, and they were [usually found in urban rather] than rural areas." Shaffer, *supra* note 174, at 485. Potter's fields were often moved or abandoned, particularly after epidemics, and it is "rare to be able to identify one of them today. Today, the principal problem of these potter's fields is their inadvertent discovery and exposure during urban construction projects." *Id.* All jurisdictions have statutes that outline procedures for unexpectedly finding human remains, and for their disinterment and reburial. *Id.*

solitary, reflecting the fact that sometimes it was necessary to bury someone in the location where he or she died.¹⁹⁵ On farms, particularly in the South, families had their own fenced-in burial plots, usually located on a hill, under trees planted for shade.¹⁹⁶ In towns, most burials took place in church graveyards, or in the town square, and because land was in short supply, and death was such a commonplace event, graveyards often became the place for public gatherings.¹⁹⁷ When farmers were hard up for prime grazing land, they “rented

¹⁹⁵ *Id.* at 483 (internal quotation marks omitted). And sometimes they were located in sites close to where Native peoples were buried, causing confusion for those archeologists who try to comply with the strictures of the Native American Graves and Relics Repatriation Act. *Id.* This federal law provides strict procedures for those who handle Native American remains, but it does not apply to the remains of non-Native Americans. 25 U.S.C. §§ 3001-3013 (1990). Thus, the blending of burials at pioneer cemetery sites can sometimes pose difficult compliance issues. Shaffer, *supra* note 174, at 483.

¹⁹⁶ GREENE, *supra* note 176, at 14-15. “Family plots came about in the American colonies out of need. For families living on isolated farms or plantations, it wasn’t practical to haul a dead body through miles of wilderness to the nearest town.” *Id.* at 14. “On southern plantations with African slaves, the . . . master [would] often g[i]ve a small piece of his property[,] . . . sometimes called ‘God’s Little Acre,’” for the burial of slaves, but sometimes trusted or lifelong house servants were buried near the master’s family. *Id.* at 16-17. In the urban north, slaves and free blacks also had burial grounds separate from white cemeteries, often “located in undesirable sites outside the city.” *Id.* at 17-18. In New York City, the Negroes Burial Ground was first located beyond the city wall in a swamp; later “it was moved several times, leaving behind the graves of the dead. These unclaimed remains fell to the plow or were built over as the city expanded.” *Id.* at 18. One such cemetery, unearthed during the construction of a federal courthouse in lower Manhattan, is now the African Burial Ground National Monument, located at Duane Street and African Burial Ground Way (formerly Elk Street). Most people do not realize that even today, only “[a] few states—including California, Indiana and Washington—require their residents to bury their dead in established cemeteries” HARRIS, *supra* note 153, at 152. And in Washington, if the interment is on your “own island,” then it is permissible. *Id.* Other states allow families to create domestic burial grounds on their own land, although there are restrictions, such as requiring a certain distance from water bodies, neighboring residences, utility poles, etc., and the amount of soil that must cover the casket—anywhere from eighteen inches to four feet. *Id.* Even if the state does not ban private graveyards, local entities, counties, towns, and municipalities, may have regulations; generally home burials are more likely to be allowed in the country, in rural and agricultural locales, than in urban and suburban locales where they tend to be prohibited. *Id.* “No state law requires that a body be buried in a casket or other container,” although cemeteries may require that. *Id.* at 153. “In your own graveyard, however, you may bury a family member in nothing but a cloth or shroud. If you do, it is a good idea to bury remains many feet below the ground to keep animals at bay.” HARRIS, *supra* note 153, at 153. No law prevents you from burying remains on your private property, rural or urban. *Id.*

¹⁹⁷ GREENE, *supra* note 176, at 23. This has been true in Europe as well. Up to the sixteenth century, cemeteries were “often open spaces, in towns one of the few public places where people could meet together and the setting for a number of communal activities: dances, markets, games, fights, agitation and gatherings of all kinds.” Roberts, *supra* note 191, at 138.

cemetery land where their livestock would graze among the graves.”¹⁹⁸ Potter’s fields were located either on the outskirts of town, or in a small segregated area of another cemetery.¹⁹⁹ The attitude towards death was, if anything, intensely pragmatic.

Overcrowding and environmental degradation from urban burial sites were serious problems in towns and cities in the early years of the Republic.²⁰⁰ As one late eighteenth century foreign visitor wrote about his visit to a religious burial ground, the site was a “soppy church-yard where the mourners sink ankle deep in a rank and offensive mould, mixed with broken bones and fragments of coffins.”²⁰¹ The original burial ground in New Haven, Connecticut was a particular mess, with four to five thousand graves crammed into 7,000 square feet; one visitor complained that it had been “degraded into a mere common object, and speedily loses all its connection with the invisible world in a gross and vulgar union with the ordinary business of life.”²⁰² The attitude towards the corpse was revulsion: the dead were polluting the urban living space, and needed to be dealt with.²⁰³ The city of New Haven took the lead in solving these problems

¹⁹⁸ GREENE, *supra* note 176, at 23. A common problem in sixteenth century French cemeteries was that stray pigs and dogs would dig up the bones, leading to enclosure and locking of some cemeteries, “an increasingly common occurrence by the seventeenth century and also reflected a greater reverence for such sites.” Roberts, *supra* note 191, at 138-39.

¹⁹⁹ GREENE, *supra* note 176, at 24.

²⁰⁰ *Id.* at 22-23.

²⁰¹ *Id.* at 25 (internal quotation marks omitted).

²⁰² *Id.* (internal quotation marks omitted).

²⁰³ *Id.* Anthropologists have understood that both of the competing American ways of death—burial and cremation—are responses to the decay of a rotting corpse. STEPHEN PROTHERO, *PURIFIED BY FIRE: A HISTORY OF CREMATION IN AMERICA* 4 (2001). With a burial, decay of the material body is dealt with by preservation via embalment, a coffin, and a burial; “the preserved dead are said to be merely sleeping, patiently awaiting a future bodily resurrection, perhaps in a coffin designed to provide eternal protection from the elements.” *Id.* Cremation, on the other hand, deals with decay by “accelerating, not arresting it. Rather than preserving the corpse through embalming, cremationists annihilate it through incineration. Confident that the true self is spiritual rather than material, they welcome the swift fragmentation of the body into ashes.” *Id.* at 5. Unlike cemeteries where bodies are buried—and visited by the living—cremated remains tend to be scattered, and “there is no place for the living to visit the dead and thus no memorial site for the living to maintain, perpetually or otherwise.” *Id.* For cases of witchcraft and heresy, burning was an option, on the theory that the use of fire cleansed the soul. DANIELL, *supra* note 150, at 106. It was noted sometime around the Norman Conquest that there was a popular belief about ghosts or the undead that “the devil reanimated the corpse and then used it to play a variety of tricks on the living. The only remedy was to dig up the corpse and consume the body with fire.” *Id.*

by dedicating land outside of the town center to an incorporated burying society.²⁰⁴

In 1790, Josiah Meig, the designer of the New Burying Ground in New Haven, did something radical: he enclosed and leveled a ten-acre field, and divided it into fenced sections, separated by paths wide enough for a carriage to pass through.²⁰⁵ Anyone who could afford a plot could purchase one, and several plots were reserved for different religious congregations, for graduates of Yale, and even for African Americans.²⁰⁶ The New Burying Ground was located away from the ordinary business of daily life, and unlike the cramped church graveyards in town, New Haven had “created an island of order, serenity, peace and respect for the dead.”²⁰⁷ This ushered in a new era of landscaping as well, with tall Lombardy poplars lining the roads, and weeping willows throughout; families installed large marble monuments elaborately carved that bore their name.²⁰⁸ Not everyone approved of this radical idea of a cemetery unaffiliated with a church or religion, and some did not like its “precise lines and geometric layout,” but representatives from other cities came to New Haven to study the New Burying Ground, hoping to copy its plan.²⁰⁹ It was a

²⁰⁴ GREENE, *supra* note 176, at 26-27.

²⁰⁵ *Id.* at 26. The other New Haven mover and shaker was a local politician and businessman named James Hillhouse, who formed a corporation to purchase the land; incorporation of the New Burying Ground Society ensured that it would make its own decisions, and own and control the property. *Id.* at 25-26. Those who purchased the plots were members of the corporation, and no minister or government official could “determine who would be buried where or whose remains would be removed. The burial grounds were legally protected sacred ground, even though the site was nowhere near a church.” *Id.* at 26.

²⁰⁶ *Id.*

²⁰⁷ GREENE, *supra* note 176, at 26.

²⁰⁸ *Id.* at 27.

²⁰⁹ GREENE, *supra* note 176, at 28. The location of Jewish graves has always been at a significant distance from their houses of worship, and since their earliest days in America, Jews established their own burial grounds. YALOM, *supra* note 12, at 31. When municipal graveyards began to appear in the middle of the nineteenth century, Jews were often allotted specific portions; the same was true in interdenominational Protestant cemeteries. *Id.* at 31-32. For example, Jews had their own very specific portion of the Atlanta Oakland Cemetery, established in 1850. *Id.* at 31. Most of the first Jews in Atlanta were laid to rest on a spacious hillside; they were Reform Jews from Germany, and their inscriptions are in English, German, and the occasional Hebrew. *Id.* at 31-32. “Less affluent Orthodox Ashkenazis from Russia, [who] arriv[ed] in the late nineteenth century, were granted the remaining, narrow edge of the Jewish strip. Their upright tombstones marked in Hebrew are huddled together like bodies seeking one another’s warmth.” *Id.* at 32. It was not uncommon for Jews to be buried on the margins of the land, and often, the Jewish cemetery was enclosed by a wrought-iron fence. YALOM, *supra* note 12, at 32. As one writer put it, “[i]t is hard to know today whether the barriers were intended to keep Jews at a distance from Christians, or Christians away from

tourist attraction as well, and people flocked to the cemetery as “they would travel to other places of interest.”²¹⁰ The stage was set for the next chapter in the history of American cemeteries: Mount Auburn and the rural cemetery movement.

In the mid-1800s, America experienced a period of rapid industrial growth; the populations of urban centers swelled as people left the farms and poured into the cities to take jobs in factories and mills.²¹¹ Cities such as Boston found themselves in an acute crisis with respect to the disposal of the dead—the city’s water and air became polluted not only from human and industrial waste, but also from the foul smells from decaying bodies in the city’s dilapidated graveyards.²¹² A group of citizens, led by Jacob Bigelow, a local doctor and botanist, planned a new burial ground outside of the city that came to be known as the Mount Auburn Cemetery.²¹³ Mount Auburn was the first and most famous of the “rural cemeteries,” the prevailing mode of urban burial from 1830 to 1855.²¹⁴ Opening in 1831, Mount Auburn was unique in that the cemetery land actually belonged to the Massachusetts Horticulture Society, but the rights of use for the lots would belong to the decedents and their heirs in perpetuity.²¹⁵ While this collaboration between the Horticulture

Jews;” the segregation of Jews was true in Chicago’s Oak Woods Cemetery, and Wilmington, North Carolina’s Oakdale Cemetery. *Id.* “Because burial space in Jewish cemeteries was limited to Jews,” this acted as a deterrent to marrying outside of the faith: “In principle, you would not want to marry someone who could not be buried next to you.” *Id.* Exceptions were made, for example, for the gunfighter Wyatt Earp, “whose ashes [are] placed in the family plot of his Jewish wife, Josephine Marcus,” in Colma, California. *Id.* These days, some Jewish cemeteries accept non-Jewish spouses. *Id.* “The earliest Jewish cemeteries were established by Orthodox Iberian Sephardim”; later, when Jews from Germany introduced the liberal Reform movement to this country, and Conservative Judaism offered a “middle-of-the-road alternative[,] . . . each group had to have its own cemetery, sometimes across the road from one another or even side by side.” YALOM, *supra* note 12, at 31. Today, most Jewish cemeteries accept Jews from all three traditions, Orthodox, Reform, and Conservative. *Id.* at 32.

²¹⁰ GREENE, *supra* note 176, at 27.

²¹¹ *Id.* at 29.

²¹² *Id.* at 30. This was before bodies were embalmed, and grave looters often dug up coffins for jewelry and other valuables buried with the dead, often leaving “the decaying corpses lying about. Concerns about the decomposition and stench of corpses in the heart of Boston led city officials to look for better ways to bury the dead.” *Id.* at 31.

²¹³ *Id.* Jacob Bigelow’s interests determined the development of the rural cemetery, since he was both a botanist and a physician, having graduated with his M.D. from the University of Pennsylvania in 1810, and having published a treatise on the city’s plant life in 1814. FARRELL, *supra* note 155, at 100.

²¹⁴ GREENE, *supra* note 176, at 35.

²¹⁵ FARRELL, *supra* note 155, at 101.

Society and the cemetery did not continue beyond 1835, from that time onwards, subsequent rural cemeteries were established as independent, specialized institutions for the burial of the dead.²¹⁶

Mount Auburn was an extraordinary amalgam of garden, public park, tourist attraction, and burial place, and it served as the model for at least ten major rural cemeteries built on the edges of cities in the East, among them Laurel Hill in Philadelphia (1836), Greenwood in Brooklyn (1839), Albany Rural (1841), Allegheny in Pittsburgh (1844), and Spring Grove in Cincinnati (1844).²¹⁷ By 1849, the Auburn model had moved westward to Saint Louis, and eventually to California by 1863—the concept of the rural cemetery had struck a chord throughout the country.²¹⁸ These rural cemeteries were “the first large open public spaces in the United States. They served as models for the nation’s city public park systems.”²¹⁹ In Mount Auburn, bereavement was surrounded by natural beauty, with picturesque landscaping, and a “network of ponds and wetland and a forest of pines, oaks and beeches. A system of roads wound through the cemetery.”²²⁰ Supporters extolled the rural cemetery as a place where a living person could commune with nature, with God, and with friends and family members who had passed on.²²¹ Indeed, they brought the word “cemetery” into usage; it comes from the Greek for “sleeping chamber,” the idea being that death is “a long, restful sleep, a temporary slumber on the journey to eternal life.”²²² Presumably the

²¹⁶ *Id.* Mount Auburn was located on the banks of the Charles River, four miles west of the city. *Id.* at 104. United States Supreme Court Justice Joseph Story spoke at the dedication of Mount Auburn to a crowd of nearly 2,000 people, and he was very critical of the overcrowded, unkempt, unhealthy, and unsightly burial grounds of the city; little care was taken to maintain the burial grounds, and “in opening old graves and tombs for the commitment of new corpses, cemetery workers allegedly exposed the living to miasmatic vapors generated by the decay of the dead.” *Id.* at 102, 103.

²¹⁷ GREENE, *supra* note 176, at 34-35.

²¹⁸ *Id.* at 35. In Saint Louis, the cemetery was Bellefontaine Cemetery, and in Oakland, California, it was Mountain View. *Id.*

²¹⁹ *Id.* at 35.

²²⁰ *Id.* at 32.

²²¹ GREENE, *supra* note 176, at 32.

²²² *Id.* at 40 (internal quotation marks omitted). When Justice Joseph Story gave the address at the opening of Mount Auburn, he told the crowd:

Dust as we are, the frail tenements which enclose our spirits but for a season, are dear, are inexpressibly dear to us. We derive solace, nay pleasure, from the reflection, that when the hour of separation comes, these earthly remains will still retain the tender regard of those whom we leave behind . . . our place of burial will be remembered for generations.

FARRELL, *supra* note 155, at 102 (internal quotation marks omitted).

ability to visit the dead relieved anxiety about one's own death, and made those who visited feel less acutely the pain of separation that death had not only threatened, but delivered on.²²³ In the rural cemetery, death was celebrated.

The space afforded by a rural cemetery permitted a revolution in cemetery art, with large, lavish and original sepulchral sculpture, featuring life-sized angels, grieving mourners draped over the graves, and highly personal statues reflecting the achievements of the deceased—a ship's captain or a war veteran, or his status—a child or the owner of a faithful dog.²²⁴ Families erected lavish monuments, extravagant, spacious stone mausoleums that “stood like small mansions on the grounds.”²²⁵ Love of nature, consolation, and death itself were all put on center stage in the rural cemeteries, and people flocked to see the show, as the vast number of visitors attested. Laurel Hill Cemetery in Philadelphia boasted 30,000 tourists a year, and Green-Wood Cemetery in Brooklyn “drew such streams that special carriages had to be stationed to convey the visitor to an afternoon of boating or peaceful botanical study on shore.”²²⁶ Many middle-class families during the Victorian era would visit a cemetery park on Sunday afternoons, “to ‘visit their dead,’ to stroll for exercise, or to have a picnic.”²²⁷

²²³ GREENE, *supra* note 176, at 36. Victorians had a rigorous and detailed system of rules that governed proper mourning attire and behavior. SCHLERETH, *supra* note 64, at 292. Women who were in “‘full’ or ‘deep’ mourning wore dresses of black bombazine and mourning bonnets with long, thick, black crepe veils.” *Id.* Black gloves and handkerchiefs with a black border completed the outfit, and often an oval brooch, containing a lock of hair from the deceased, was worn. *Id.*

²²⁴ EDMUND V. GILLON JR., VICTORIAN CEMETERY ART xi (1972). “Specific types of graves follow: those for soldiers, ministers, ship captains, firemen, and others. After these groups come certain fixed symbols—logs, trunks of trees, baskets of flowers, lodge emblems. Animals are shown—dogs guarding their master’s graves, as well as lions, eagles, doves.” *Id.*

²²⁵ GREENE, *supra* note 176, at 32-33. “Those who could afford it [w]ould hire private gardeners to tend to their plots.” *Id.* at 33. As one cemetery maven put it, “If your ancestors were entombed in a family mausoleum, you can be fairly confident they had some bucks. Sometimes the deceased was cremated, and the urn was put in the mausoleum; more commonly, caskets were placed inside.” CARMACK, *supra* note 12, at 92.

²²⁶ GILLON, *supra* note 224, at IX. “The proprietors of Mount Auburn, for example,” tried to make the cemetery attractive to visitors by installing a fancy gazebo, including a pump house providing cool well water; in 1861 public toilets were added for women and children near the entrance, and in 1869, a reception house that served refreshments was added to provide safe quarters for those waiting for public transportation. GREENE, *supra* note 176, at 38-39.

²²⁷ SCHLERETH, *supra* note 64, at 292 (internal quotation marks omitted). As one young British visitor noted, “Cemeteries here are all the ‘rage’ . . . people lounge in them and use

While these rural cemeteries dominated burial reform until the last decades of the nineteenth century, they eventually fell into decline. Even before the Civil War, maintaining and protecting the exquisitely landscaped “natural” spaces of the rural cemetery had become too expensive and time-consuming.²²⁸ Furthermore, since the lot owners had the right to do what they wanted to with the plots, the cemetery design lacked uniformity, and upkeep was spotty as well; “the earlier ordered, scenic representation of nature took on a cluttered, unkempt look.”²²⁹ The real challenge to the rural cemetery, however, was the establishment of public parks in many large cities, created by landscape designers such as Frederick Law Olmsted who, when he crafted Central Park in New York City, borrowed many of his ideas from the rural cemeteries.²³⁰ If there were new, centrally located urban green spaces in which to pursue one’s leisure, why would anyone choose to travel to the city’s edge to have a picnic in a rural cemetery?²³¹ The willingness to combine recreation with a visit to the dead had diminished over time. As Olmsted wrote about the location of Grant’s Tomb at the terminus of the Promenade that ran along the Hudson: “It is a very fine site for a public monument. But it will be extremely unfortunate if, on the one hand, the remains of the dead are brought into close association with the gayety of the Promenade at this culminating point.”²³²

them (as their tastes are inclined) for walking, making love, weeping, sentimentalizing, and every thing in short.” GREENE, *supra* note 176, at 36.

²²⁸ GREENE, *supra* note 176, at 40.

²²⁹ *Id.*

²³⁰ *Id.* at 40-41.

²³¹ *Id.* at 41. Some of the fun was in leaving the city. Even as late as the 1920s, New Yorkers used Long Island’s cemeteries as “quiet places with grass and trees in which one could picnic.” CARO, *supra* note 114, 154. Before Robert Moses remade Long Island, with its parkways, expressways, and many state parks, New Yorkers had to travel along Northern Boulevard as far east as Smithtown, the township east of Huntington. *Id.* Smithtown “alone had 92.5 acres of cemeteries, and fallen tombstones made excellent picnic tables. When the cemeteries were filled, there were always farms . . .” *Id.*

²³² ANDREW S. DOLKART, *MORNINGSIDE HEIGHTS: A HISTORY OF ITS ARCHITECTURE CULTURE & DEVELOPMENT* 24 (1998). The public’s notion of how to use a park changed over time as well. Early on, the philosophy that governed parks was the belief that

parks were only land and the trees and grass and brooks on the land, that their sole purpose was to serve as “breathing spaces” for the city masses and to enable them to relax and meditate among beautiful surroundings, to commune with nature, and that they should therefore be kept in their natural state.

CARO, *supra* note 114, at 166. By the 1920s, the city masses wanted space “not only to meditate but to swing—to swing baseball bats, tennis rackets, golf clubs and the implements

The next chapter in the history of cemeteries in the United States took its cue from these new city parks; this type of cemetery is usually referred to as a “lawn park” cemetery, in vogue from 1855 to 1917.²³³ Lawn park cemeteries stressed uniformity, standardization, and subordination of originality. “Indeed, the most marked characteristic of a lawn cemetery was its predetermined plan, and the extent to which the plan took precedence over individual preferences.”²³⁴ Unlike the wooded groves, winding paths, and “natural” scenery of the rural cemeteries, lawn park cemeteries featured meadows, offering an uninterrupted vista for visitors.²³⁵ The plant life was minimal, and accentuated the openness of the plan, instead of shading the graves; “[t]rees, shrubs and flowers dotted the hillsides and clung to the curved shorelines of a little lake.”²³⁶ The cemetery was subdivided by only a few pathways, and visitors now crossed the green grass that covered the grounds; from a distance, only a scattering of monuments were visible since most of the graves were marked with bronze tablets that were inserted flush against the surface of the sod.²³⁷

Once again, the lawn park design reflected a shift in attitude towards death, seeking to efface the fear of death by rendering it picturesque—and barely visible.²³⁸ As one cemetery superintendent put it:

[Y]ou have seen cemeteries all filled up with weepers,
with weeping willows cut in the headstones, or

of the other sports that their new leisure time had enabled them to learn . . .” *Id.* In the 1920s, Robert Moses had ambitious plans for his Long Island Parks; of Montauk Peninsula, he wrote, “The irregular shore line and a number of small islands . . . form a veritable patchwork of smaller peninsulas, straits and bays which afford many miles of beaches, dunes, and varied waters for cruising, fishing, swimming, golfing and other forms of recreation.” *Id.* at 169 (alteration in original) (internal quotation marks omitted). These kinds of park uses would not be appropriate in a cemetery.

²³³ GREENE, *supra* note 176, at 42.

²³⁴ FARRELL, *supra* note 155, at 118. Of course, the same could be said of the military cemeteries. “The nation’s first military cemetery, Arlington National Cemetery, was created in 1864 in Arlington, Virginia”; Gettysburg was also established during the Civil War. GREENE, *supra* note 176, at 48-49. Most of the graves in Arlington are uniform, with a few exceptions for famous internees such as the boxer Joe Louis, the novelist Dashiell Hammett, and of course, John F. Kennedy. See SMITHSONIAN.COM, <http://www.smithsonianmag.com/multimedia/videos/The-Residents-of-Arlington-Cemetery.html> (last visited Mar. 18, 2013).

²³⁵ FARRELL, *supra* note 155, at 115.

²³⁶ *Id.* at 115-16.

²³⁷ *Id.*

²³⁸ *Id.* at 131-32.

monuments, and iron fences around lots of the iron weepers . . . You, too felt like weeping. Thanks to the influence of the surroundings, we do not want any more weepers, death is sad enough without such emblems. Using those trees that inspire joy and gladness and help us forget trouble . . . make the surroundings cheerful and bright . . . Kill off every plant and remove everything you see that suggests sadness.²³⁹

This was a radical departure from the rural cemetery that sought to inspire weepage. The lawn park cemetery sought to make death disappear.

And more to the point, the lawn park cemetery was a business.²⁴⁰ It was run by a professionalized elite, members of the Association of American Cemetery Superintendents (hereinafter “AACS”), founded in 1887—all of whom assumed the lawn park’s superiority over the rural cemetery.²⁴¹ Efficiency and cost concerns trumped aesthetics, or at least the aesthetics promoted had to also comport with principles of scientific management. Cemetery superintendents of the AACS exercised strict control over the use of the land in lawn park cemeteries, for example, forbidding any fences or stone coping that enclosed the graves in a rural cemetery.²⁴² Because of the time it took to trim the grass around the fencing or coping, it cost four times more to care for fenced-in graves than for graves under the lawn plan.²⁴³ The lawn mower, invented in 1830, was used in the early lawn park cemeteries, and it could do the work of

²³⁹ *Id.* at 132.

²⁴⁰ Until the late nineteenth century, most Americans who died were prepared for burial at home, but eventually funeral directors, and the funeral industry, took control. YALOM, *supra* note 12, at 48-50. Prior to the nineteenth century, the decay of a corpse was considered both natural and inevitable, and resulted in burials taking place soon after death. SCHLERETH, *supra* note 64, at 291. Decay was arrested, however, by new chemical procedures that were developed in the nineteenth century. *Id.* Refrigeration was first tried, as in the Frederick and Trump corpse cooler, but Civil War undertakers, with contracts for burying the dead, experimented with arterial embalming. *Id.* at 291-92. By the 1880s, it was possible to keep a corpse on view for several days, and morticians “had also perfected the public display of the body, clothed and seemingly asleep, by closing its eyes and mouth, inserting false teeth if necessary, sewing its lips shut, and tinting the face with cosmetics.” *Id.* at 292. This period gave rise to the professional mortician, “a new term to ape the status of the physician,” who learned mortuary science in colleges and universities; they were also known as “embalming surgeons.” *Id.* at 292-93.

²⁴¹ FARRELL, *supra* note 155, at 116.

²⁴² *Id.* at 120.

²⁴³ *Id.*

more than half a dozen men using handheld scythes.²⁴⁴ With the newly mechanized technique of cutting grass, new varieties of grass, and new lawn care products, it became easier and cheaper to maintain the grounds.²⁴⁵ Cemetery superintendents adopted regulations to achieve uniformity and efficient maintenance on a wide range of issues, including the size for headstones (no more than six inches), the standard height of grave mounds (no more than four inches), and the number of monuments allowed per family plot (no more than one).²⁴⁶ The AACCS also suggested limits on the number of vaults in a cemetery, and according to their guidelines, lot owners could do their own plantings, but only if they followed the cemetery's regulations.²⁴⁷ While the rural cemeteries had lavish sepulture sculptures to encourage their visitors to contemplate death and commune with the dead, the lawn park cemetery managers wanted to "depersonalize and deemphasize death."²⁴⁸ Again, attitudes towards death had changed, and by the beginning of the twentieth century, the popularity of the lawn park cemetery was widespread.

It may seem arbitrary to end our history of American cemeteries at the dawn of the memorial park—or theme park—cemeteries made popular by Hubert Eaton's high concept extravaganza, Forest Lawn in Los Angeles.²⁴⁹ Forest Lawn remains one of the most popular tourist attractions in southern California, with its palatial buildings, lush plantings, gift shops, many chapels, reproductions of famous art, and the more than 250,000 interred.²⁵⁰

²⁴⁴ GREENE, *supra* note 176, at 46-47.

²⁴⁵ *Id.* at 47.

²⁴⁶ *Id.* at 44, 47.

²⁴⁷ *Id.* at 47.

²⁴⁸ FARRELL, *supra* note 155, at 126-27. The cemetery managers adopted many practices to distract the visitors at a funeral from wallowing in grief, and being consumed by death; for example, they removed the excavated dirt from the site, and covered the mound with a covered cloth, lining the grave with flowers. *Id.* at 135. An "automatic casket lowering device" was invented, and "the beholders feel that the departed friend has been gently lowered into a curtained couch rather than into the bare cold ground." *Id.*

²⁴⁹ YALOM, *supra* note 12, at 225. Forest Lawn, founded in 1906, is possibly the best known cemetery in the United States, bringing Eaton's obsession with a happy, eternal life to new heights. *Id.* Eaton conceived of an all-purpose cemetery that included a mortuary, a flower store, a chapel, a giant mausoleum, as well as many replicas of Western masterpieces, including Michelangelo's David—it has been dubbed the "Disneyland of Death." *Id.* at 226-27.

²⁵⁰ See FOREST LAWN, <http://www.forestlawn.com/> [<https://web.archive.org/web/20130311145448/http://www.forestlawn.com/>]. Forest Lawn also provides for cremations with a variety of package deals:

The influence of the Forest Lawn concept is integral to any thorough history of the American cemetery.²⁵¹ The notion of turning a cemetery into a park for the living could also inform our discussion about what to do with a site such as the forgotten Central Islip State Hospital cemetery. The dynamic interplay between the cemetery and the park over the last few centuries of American history may have implications for their future use. There is historical precedent for turning a cemetery into a park, one that we might draw upon as we rededicate the use of abandoned and forgotten asylum cemeteries.²⁵²

Memorial Service Following Cremation—A set time for family and friends to gather, share memories, and show support . . .

Visitation with Cremation to Follow—An opportunity for family and friends to come together in a planned tribute to a loved one . . .

Funeral Service with Cremation to Follow—A personalized life celebration with both a set visitation time and planned ceremonial events with casket present.

Cremation, FOREST LAWN, <http://www.forestlawn.com/Cremation/Index.asp> [<https://web.archive.org/web/20130127075831/http://www.forestlawn.com/Cremation/Index.asp>]. Cremation was widespread in ancient India, with the Upanishads “describ[ing] cremation as a purification process in which burning the body cleanses the soul, preparing it for rebirth.” PROTHERO, *supra* note 203, at 6. “The ancient Greeks also preferred cremation to burial,” as did the Romans towards the end of the Republic. *Id.* The dominance of cremation over burial in the West came to an end near the beginning of the Christian era, and by Charlemagne’s time, cremation was considered a capital offense, although “it persisted into the Middle Ages among[st] the Celts, Germans, Scandinavians, and Anglo Saxons.” *Id.* The Christian myth was that “Jesus would return and summon the sleeping corpse out of its grave for judgment” and reenact the miracle of the bodily resurrection. *Id.* at 7. This myth resulted in burial having a near monopoly over the disposal of the dead for roughly 1500 years. *Id.* While rare in the nineteenth century, cremation had boomed at the end of the twentieth century. PROTHERO, *supra* note 203, at 10. In 1963, only 4% of bodies were cremated; by 1999, 25% of deaths were followed by cremation, and in some states, cremation overcame burial. *Id.* In England, cremation rates were at about 70%. *Id.* This represents a significant shift from the late nineteenth century when earth burials in the United States had a virtual monopoly. *Id.* In Crestone, Colorado, the Crestone End of Life Project has now made it possible for the residents of Crestone to have an open-air cremation. Ivan Moreno, *Funeral Pyres an Option in Colorado Mountain Town*, WASH. TIMES (Feb. 1, 2011), <http://www.washingtontimes.com/news/2011/feb/1/funeral-pyres-an-option-in-colorado-mountain-town/?page=all>.

²⁵¹ GREENE, *supra* note 176, at 60. Eaton sought to emphasize the living, and not the dead, and added wedding chapels for all religions: “[T]he Little Church of the Flowers, the Wee Kirk o’ the Heather; and the Church of the Recessional[;] [m]ore than sixty thousand people have been married at Forest Lawn.” *Id.* at 59. Forest Lawn “became the model of the twentieth-century cemetery. It combined the celebration of life with a keen sense of business, advertising, and profits. At the same time, it kept the unpleasantness of death in the background, safely out of sight and out of mind.” *Id.* at 60.

²⁵² There is a movement in the United States towards what is called a “natural burial.” Here is one definition:

Natural burial, also called green burial, is the way our ancestors buried their dead. There are three standards that define a natural burial: there can

But for this reason, we can, with integrity, deviate from history's path at the period of the lawn park cemetery: most of the asylum-building in the United States took place in the late nineteenth and early twentieth centuries, and their abandoned or forgotten cemeteries are by and large of the lawn park genre.²⁵³ Certainly that is true of the cemeteries at the farm colony hospitals on Long Island. Our silent neighbors to the south rest beneath the ground in a classic lawn park cemetery, with an undulating meadow, cut in half by a single tree-lined roadway, and uniform, concrete markers flush to the ground. Aside from a handful of free-standing monuments and a random obelisk, no visual cues exist to alert a visitor that more than 5,000 people are buried there. The history of the American cemetery gives us insight into its design—and reassurance that no one sought to disrespect those who were buried there by that design. The administrators of the Central Islip State Hospital were *not* seeking to hide what they were doing. The way that the cemetery looks is not a matter of the “forgotten in life, forgotten in death” syndrome. Rather,

be no embalming, no vaults, and all burial containers or shrouds must be biodegradable. It is the choice consistent with the desire to limit one's impact on the environment, and it is legal in all 50 states.

Learn About Green Burial, PRAIRIE CREEK CONSERVATION CEMETERY, <https://www.prairiecreekconservationcemetery.org/faq-green-burial/> (last visited Nov. 29, 2018).

Conservation burial is natural burial that goes a step further to conserve land. A portion of each burial fee is committed to pay for land acquisition, protection, restoration, and management. The burial area also becomes hallowed ground, restored to its natural condition and protected forever with a conservation easement. Native plants beautify the burial sites.

Id. As part of this movement, fifteen nature preserve cemeteries have been dedicated in the United States, the first in 1998 in Ramsey Creek, South Carolina. Kate Yeomans, *The Wilderness Cemetery: A New Approach to Funding Land Conservation*, CONSERVATION MAVEN (Mar. 31, 2010), <http://www.conservationmaven.com/frontpage/the-wilderness-cemetery-a-new-approach-to-funding-land-conse.html>. Foxfield Preserve in Wilmot, Ohio, was the first nature preserve cemetery to be operated by a conservation organization, “as an ecopreneurial venture to increase the center's income in support of its conservation mission.” *Id.* The burials in the Foxfield Preserve cemetery are very low in density, allowing nature to dominate the landscape; “they anticipate hosting no more than 200 burials per acre . . . in contrast to a modern cemetery where one would find more than 1,000 burials per acre.” *Id.* In their first two years of operation, they sold sixty plots, and had about a dozen burials; the plots are \$3,200 pre-need, and \$4,000 at need, and “[a] portion of the cost can be a tax-deductible donation. While this cost is more than most traditional cemetery prices, the savings on vault, casket and other items make natural burial much more economical.” *Id.* Families are allowed to close the grave, which most cemeteries do not allow. *Id.*

²⁵³ The trend of lawn park cemeteries emerged in the nineteenth century. Rebecca Boggs Roberts, *Death is Never Over: Life, Death and Grave Robbery in a Historic Cemetery* (May 20, 2012) (unpublished M.A. thesis, Princeton University) (on file with ProQuest LLC).

the way the cemetery looks is a reflection of the burial practices of a lawn park cemetery—and is utterly consistent with the burial practices of its time. We need feel no guilt for the look of the cemetery, or its flat markers—or for the fact that our guileless trespasser could not tell from a distance that he was on the edge of a cemetery.

The guilt lies elsewhere, with the lack of access to the cemetery, and with the anonymity of the people who are buried beneath those numbered concrete slabs. This is where it begins to matter *who* is buried in the Central Islip State Hospital cemetery. These deviations from normal burial and cemetery practices would not have been tolerated if the people buried there were not former patients in state mental institutions. This is the place to contemplate the “forgotten in life, forgotten in death” syndrome, not in the cemetery’s lawn park design.

In the third part of the essay, we will explore further the harm done when a grave is not identified, or when a family member must trespass to visit the dead. This leads us into analyzing who is a stakeholder in a cemetery generally, and who is harmed by it becoming abandoned or forgotten.

III. WHO ARE THE STAKEHOLDERS IN A CEMETERY AND WHO LOSES OUT WHEN IT IS ABANDONED OR FORGOTTEN?

In deciding what to do with an abandoned or forgotten asylum cemetery, we need to state some principles about the stakeholders in cemeteries in general, and to consider who is harmed when *any* cemetery becomes abandoned or forgotten. Once that foundation is laid, we can turn our attention to the more specific issues raised by an abandoned asylum cemetery. The issues that arise from the abandonment of any cemetery overlap and resonate with those that arise from the abandonment of a cemetery for the mentally ill. The lack of headstones and the locked gates to an asylum cemetery, however, are the crucial distinctions between them.²⁵⁴ In many ways, because state departments of mental health nominally maintain forgotten asylum cemeteries, they may be in better condition than many abandoned private cemeteries. Still, an abandoned private cemetery is often accessible, and may retain its identifying

²⁵⁴ “The chief character of any memorial, one which lent it its validity, was stability and permanence, and also accessibility.” PAUL BINSKI, *MEDIEVAL DEATH: RITUAL AND REPRESENTATION* 71 (1996).

headstones—both missing in an abandoned asylum cemetery. There are differences, and similarities.

Who are the stakeholders in any cemetery? In a private cemetery, presumably some business or religious entity owns the land, and enters into contracts granting easements for the burial of specific individuals. Some of those contracts are made with the individual himself as he prepares for the burial of his remains—the “pre-need” contracts of the modern funeral industry.²⁵⁵ Others are made with the relative of an individual who has just died—a turn of events has resulted in a familial corpse that must be disposed of in short order. Once in the ground, family members might want to visit that grave, or perhaps family members of the future might want to make a pilgrimage to that grave in pursuit of ancestral roots.²⁵⁶ In our historical period, cemeteries rarely serve as the loci of large social gatherings. However,

²⁵⁵ One reason that people want to pay for their funeral in advance is to shelter assets for Medicaid eligibility. MITFORD, *supra* note 149, at 256. While there are no federal guidelines limiting the amount that may be set aside for a funeral, some states, such as Connecticut and California, have set their own limits. *Id.*; see also Daniel Duffy, *Pre-Need Funeral Contracts*, OLR RES. REP. (Oct. 28, 2004), <http://www.cga.ct.gov/2004/rpt/2004-R-0809.htm> (limiting the amount spent on a pre-need in Connecticut at \$5,400). If the deceased had not arranged in advance for his “death care goods and services,” the arrangements are made by the survivors, and these are called “at-need services.” SMITH, *supra* note 6, at 6. Pre-need services are actually paid for in advance; “pre-arranged” services are not prefunded, and “occur when a consumer’s preferences for particular goods and services, to be delivered after her death, are placed on file at a funeral home as a matter of record.” *Id.*

²⁵⁶ The Plains Indians of North America had a custom of visiting the skulls of loved ones who had died. Once the scaffolds that held the body had decayed, and had fallen to the ground, the nearest relations would bury the bones, and sometimes the skulls,

but the custom of many clans was to lay them out [on the prairie] in circles of a hundred or more . . . placed some eight or nine inches apart with the faces all turned toward the center; where they were diligently protected and preserved in their precise positions from year to year, as objects of religious and affectionate veneration.

MAILS, *supra* note 185, at 184.

The people returned to the skull circles often to show their lasting affections for the dead. At these reunions fond affections and endearments were renewed, and animated conversations were held between relatives and the dead almost daily when the clan was in the burial area. Every skull was placed upon a bed of wild sage which was freshened at the reunion. A wife always knew the skull of her own husband or child by some mark or her vivid memorization of it. Considering the deep attachments of the Plains people, when the Whites moved the Indians away from their lands and onto reservations in the Indians’ view they literally tore them away from those they loved, and forced them to leave their deceased alone on the Plains forever.

Id. at 186.

in some cultures, even our own, it *is* a social custom for family members to visit the graves of their ancestors, or other departed loved ones, perhaps on Mother's Day, birth or death dates, or other special occasions.²⁵⁷

The truth is unless the person who is buried had some claim to fame, most people can only muster a handful of individuals who might want to visit their graves or decipher the headstones or other stone markers.²⁵⁸ And such visits require proximity between the living and the dead, something often lost in an increasingly mobile society. The small pool of potential visitors may diminish due to distance. It is also true that after the passage of many years, no family members may be left to remember the individual who was buried. Graves are visited for a generation or so, but unless the grave is a star in a constellation of other family members who died more recently, the great-grandfathers and great-grandmothers cease to be of any interest. No one who remembers the dead person is around anymore; their children, and grandchildren, are now dead themselves; in time, their graves too will be forgotten. This is not a depressing thought—merely a reality. It is in the natural progression of things that one generation replaces another, and another, and another—until most of those who are beneath the ground are remembered by no one now living. Remember the 107 billion dead souls who preceded us on the planet? No one alive remembers the vast majority of them.

That said—and forgetting the public's interest in rational and desirable land use—here is my list of stakeholders in a cemetery:

- 1) The owners of the land, who may have no attachment to any of the dead person(s) buried in the cemetery, but who may have a legal obligation to care for the graves;
- 2) Members of the dead person(s) religious or other kind of community who may, or may not, remember

²⁵⁷ The desire to be buried next to family members was particularly common after the Reformation, but “family ties feature strongly in medieval requests for burial,” even for those who were not noble. DANIELL, *supra* note 150, at 101. The most common requests, from a study of 4,200 medieval wills, was to be buried near (or with) a spouse, or with a spouse and children, or with parents; the only request to be buried with an “extended family came with four requests to be buried near an uncle. There were no requests for burial with an aunt, grandparents, godparents or close friends.” *Id.* at 101-02.

²⁵⁸ In this discussion, the author will use the term “headstone” generically to refer to any permanent stone marker at a grave that identifies the occupant, and gives his or her birth and death dates.

the dead person(s), but who feel they have a moral obligation to care for the graves of community members;

- 3) The still-living family members who remember the dead person(s) whose remains are in the graves and who may want to visit;
- 4) The family members of the future who may not remember the dead person(s), but who may still want to visit the graves because of a general interest in family history: the genealogist;
- 5) Members of the public who have no attachment to any of the dead person(s) buried in the cemetery, but who may still want to visit the graves for historical, pastoral, artistic, spiritual, or other reasons.
- 6) And maybe: the dead person(s) whose remains are buried in the graves.

Cemeteries often become abandoned or forgotten when the land use becomes oddly out of context with the surrounding area for a variety of reasons. Sometimes the owner of the land was a business entity that no longer exists.²⁵⁹ The land may be sold, or due to other changes of circumstances, become part of a large parcel that is *not* dedicated to burial, shoehorned between a Home Depot and a Target, or a law school and a federal court. This latter maneuver happens frequently with the cemeteries of now defunct state asylums and psychiatric hospitals; the hospitals are torn down and the land subdivided and employed for other uses, while the cemetery remains a silent, unvisited, and sometimes burdensome testament to the patients who once lived there. Cemeteries also become abandoned because the religious group that once buried their followers has moved or disbanded, and the graves they leave behind are so old that no one alive has any interest in visiting them. The story is almost always the same:

²⁵⁹ See Shaffer, *supra* note 174, at 181 for a description of what happened to the Olive Branch Cemetery in Warren County, Ohio, now hidden behind a freeway overpass, and established by “[t]he Olive Branch Church [that] 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.” The cemetery sank “into complete disrepair as the Township ceased even to mow the area in the 1980s, claiming rattlesnake infestation. 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.” *Id.*

vegetation and vandalism. The weeds begin to grow, the pathways become covered with grass, and soon it is hardly possible to recognize that the land was once dedicated as a cemetery.

Which of the stakeholders are aggrieved when a cemetery becomes abandoned or forgotten?²⁶⁰ The owner of the land, for one; he may now own a vandalized, overgrown parcel which contains graves, and as a consequence, cannot be profitably developed.²⁶¹ This may lead the owner to abandon the property altogether, and cease to *be* a stakeholder. What about the family members who still remember the dead who are buried in the cemetery? If the cemetery becomes

²⁶⁰ Each state has laws that govern the disinterment and relocation of bodies to new burial grounds if, after a notice period, the cemetery is deemed abandoned and subject to redevelopment. In New York, the law provides:

All the bodies removed by such contractor, or by order of the board shall, when distinguishable, be incased each in a separate box or coffin, and each monument, headstone, footstone, slab, board or other designation or distinguishing mark shall be properly removed and reset at the grave of each body at the time of such reinterment. Members of the same family shall be interred in contiguous graves.

N.Y. ENVTL. CONSERV. LAW § 15-2117 (McKinney 2013). There need to have been no graves within the last twenty years.

²⁶¹ It is possible in New York (and most other states), although it is not an easy process, to have a cemetery declared abandoned and to reinter the bodies elsewhere—mostly for redevelopment purposes. For cities of less than one million, the law provides:

Upon a verified petition presented to a judge of a court of record by the common council of any city of less than one million, the judge to whom said verified petition was presented shall make an order to show cause, returnable before him at a time and place within the county in not less than twenty days from the date of presentation of said petition, why the remains of any deceased person buried in potters field, or in any neglected or abandoned cemeteries in which no deceased person shall have been interred within twenty years, should not be removed to and reinterred in a properly kept incorporated cemetery in the same city or in a town or city adjoining the city in which the remains of each deceased person or persons are buried, or in lands owned by said city for cemetery purposes, and to fix the amount of expenses for such removal and reinterment and the order to show cause shall provide for its publication in a newspaper, to be designated in the order, which is published nearest to the cemetery from which the removal is to be made, once in each week for two successive weeks. The verified petition presented to the judge shall show that the petitioner is the common council of the city in which said cemetery is located and (1) the name of the deceased person or persons whose remains are sought to be removed, if known; (2) the name and location of the cemetery in which he is interred and from which removal is asked to be made; (3) the name and the location of the incorporated cemetery to which the remains are desired to be removed and reinterred; (4) the facts showing the reasons for such removal.

N.Y. GEN. MUN. LAW § 164 (McKinney 2013).

abandoned, in theory they would be aggrieved, but more than likely, by the time the cemetery has fallen victim to vegetation and vandalism, those stakeholders are themselves dead and can no longer be aggrieved. The same would probably be true of the religious group that at one time felt a moral obligation to care for the graves—presumably they too are gone and can no longer be aggrieved. The genealogists, on the other hand, *are* presently aggrieved; their interest in the cemetery is not dependent on remembering the buried individuals personally. Amateur and professional genealogists are alive and keenly interested in obtaining access to the graves of their ancestors, or those whose ancestry they are researching; they often complain about the lack of access to abandoned and forgotten cemeteries, as well as about the decrepit condition of the headstones. The members of the public who love walking around in cemeteries for historical, artistic, spiritual, or other reasons, are also presently aggrieved by an abandoned or forgotten cemetery, although chances are, they might not know of its existence, so buried in grass it might be.

As we isolate which stakeholders might be harmed by abandoning or forgetting a cemetery, the prospect of missing headstones begins to matter.²⁶² Abandoned or forgotten cemeteries are poorly maintained—or not maintained at all, and over time, headstones break, erode, become undecipherable, are buried or vandalized. Sometimes they are taken.²⁶³ What is lost when the headstones are gone? The headstone refers to and commemorates the former living persons, naming them, identifying them, and locating them in time and

²⁶² Headstones in this country have a long history, although in the colonial period, there were probably only a few full-time stone carvers; “[m]ost people who made gravestones did so as a sideline to their main trade, such as masonry, woodcarving, cabinetry, and so on.” CARMACK, *supra* note 12, at 32. In New England, where there were plenty of stone quarries, headstones did not have to be imported, but in other states, such as Virginia, headstones were imported from England, and a period of months, or even years, could pass between the date of “death and the placement of a marker, regardless of whether it was carved locally or imported”; often the family could not afford it immediately. *Id.*

²⁶³ As one genealogist wrote:

Keep in mind, too, that grave markers sometimes have a way of disappearing entirely or ending up in places you would never suspect. I’ve heard of old headstones being used for stone walkways; as building materials, like bricks; and as cornerstones for fireplaces. New owners who inherit an old, rundown cemetery on their property with just a few fallen over headstones may move these to another locality, donate them to a museum, or store them in their garage.

CARMACK, *supra* note 12, at 47-49.

space.²⁶⁴ Without headstones, those remaining family members who might still remember the dead would be unable to locate the graves—where to put the flowers, or place the stones? Neither could genealogists find the location of ancestors, or their vital and mortal information.²⁶⁵ A graveyard with no headstones would also dissuade members of the public from visiting—without headstones, and other funerary art, what is there to see? Probably the only possible stakeholder who would prefer a headstoneless cemetery would be the owner of the land who bears the burden of maintaining the cemetery,

²⁶⁴ Headstones might also perpetuate myths about the individual whose bones lie beneath. Consider these lines from Edgar Lee Masters' *Spoon River Anthology*:

When I first came to Spoon River / I did not know whether what they told me / Was true or false. / They would bring me the epitaph / And stand around the shop while I worked / And say "He was so kind," "He was wonderful," / "She was the sweetest woman," "He was a consistent Christian." / And I chiseled for them whatever they wished, / All in ignorance of its truth. / But later, as I lived among the people here, / I knew how near to the life / Were the epitaphs that were ordered for them as they died. / But still I chiseled whatever they paid me to chisel / And made myself party to the false chronicles / Of the stones, / Even as the historian does who writes / Without knowing the truth, / Or because he is influenced to hide it.—Richard Bone in Edgar Lee Masters' *Spoon River Anthology*.

Id. at 32.

²⁶⁵ Genealogists often have to resort to institutional registers when the relevant ancestor died as an inmate of a hospital, asylum, sanatorium, almshouse, or prison. CARMACK, *supra* note 12, at 30. These registers, many of which predate statewide vital statistics registration, may be in a separate book of deaths, or the deaths may be mixed in with the other entries; earlier registers may only give the name and date of death, while later registers (after 1850) may give more details, such as the name, date of admission, nativity, occupation, last residence, age, race, marital status, date of death, and by whom buried. *Id.* Finding the name of the institution itself can be difficult, as well as whether records even exist, and town, city, county, or state historical societies are the best resource. *Id.* at 31. The author warns: "Remember, access to the more recent records may be restricted because of privacy laws. Medical records of any kind are almost always impossible to get unless they are yours or you can prove you are the next of kin to the deceased person whose records you are seeking." *Id.* Sometimes names and death dates of asylum patients show up on random genealogical or cemetery websites. For example, the names and dates of death, as well as the cause of death, for "colored" asylum inmates interred at the "colored" cemetery of the South Carolina State Hospital Asylum are all listed, at least from January 1915 to January 1923. AFRICAN AM. CEMETERIES ONLINE, <http://africanamericancemeteries.com/sc/> (last visited Nov. 13, 2018). The primary cause of death of most of the inmates was pellagra. *Id.* For interested genealogists, RootsWeb, an ancestry.com Medical genealogy community, has as its topic the "Discussing and sharing of information regarding asylum patients including where to write for patient records; whether a cemetery on the grounds exists; reported deaths, births, etc. in these facilities; life in these facilities up through the 1930's; and all knowledge of any asylum, sanatorium, and/or state hospital." *RootsWeb Mailing Lists*, ROOTSWEB, <https://mailinglists.rootsweb.com/listindexes/> (last visited Nov. 13, 2018). For questions about this list, contact the list administrator at SANATORIUMS-admin@rootsweb.com.

and if the cemetery is truly abandoned, he is no longer around to hold a stake—or a lawnmower, for that matter.

The lack of identifying markers is one of the distinguishing characteristics of an abandoned or forgotten asylum cemetery; those former mental patients never had a headstone to lose.²⁶⁶ An abandoned or forgotten asylum cemetery seems to hold no persons at all. Numbers mark the graves, but numbers tell us nothing about their humanity. The names of the former mental patients are not carved in stone; nor is there any indication when they entered or exited. British medievalist Vanessa Harding, has a theory that yields insight into the graves in an abandoned or forgotten asylum cemetery.²⁶⁷ Harding characterizes a corpse as either personalized, or depersonalized.²⁶⁸ A personalized corpse is one that is identified with the former person, and a depersonalized corpse lacks any reference to the former person; she further argues that there is a spectrum of individualization or personalization.²⁶⁹ The length of time over which the personalization can be sustained is in sharp contrast to the dissolution of the corpse; no matter what the status of the former person, post-mortem decay “literally dissolves the integrity of the physical body, merging the deceased with ‘the earth from whence he came.’”²⁷⁰ The corpse changes physically, and decays, and it is thus taken further and further “from the recognizable human individual,” undermining any sense of personalization.²⁷¹ Various funeral and burial practices will ensure that the corpse will remain personalized, however. Marking the burial site, erecting carvings, displaying epitaphs which visually represent the

²⁶⁶ That the middle-class felt strongly about having a headstone to mark their graves is evidenced by the sale of headstones in the Sears, Roebuck Catalog in 1902. *Tombstones and Monuments*, SEARS ROEBUCK & CO., 1902, <http://archive.org/stream/specialcatalogue00sear#page/2/mode/2up>. The mail-order headstones ranged in price for a marker and base from \$4.95 to \$10.45, with extra charges for “plain sunk inscription letters” at six cents a letter; sunk verse letters were two and a half cents each; the stones were made variously from Acme Blue Dark Vein or White Acme Rutland Italian Marble from in Vermont. *Id.* at 4-7. Shipping costs depended on destination, and headstones weighed from 125 to 206 pounds for a standard marker and base. *Id.* at 4, 10.

²⁶⁷ Vanessa Harding, *Whose Body? A Study of Attitudes Towards the Dead Body in Early Modern Paris*, in *THE PLACE OF THE DEAD: DEATH AND REMEMBRANCE IN LATE MEDIEVAL AND EARLY MODERN EUROPE 170-72* (Bruce Gordon & Peter Marshall eds., 2000).

²⁶⁸ *Id.* at 171-72.

²⁶⁹ *Id.* at 172. Harding argues that “every body is viewed from a number of different standpoints: almost every corpse is a personalized body for someone, and every dead body presents some danger and has to be safely disposed of.” *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

dead, referring to their qualities, all of these forms of commemoration “support the illusion that the grave contains the body of a person, not a dissolving corpse.”²⁷²

About this spectrum of personalization, Harding argues: how individualized a corpse may become depends upon how influential and important the former person had been: “[T]he extent to which relatives, friends or colleagues can impose their own perception of a particular corpse on a wider circle of society is in itself a measure of social power.”²⁷³ This means that someone who was rich and famous, powerful or influential—someone who mattered to those who put him into the ground—will become a highly individualized corpse.²⁷⁴ The other end of the spectrum was the person who did not matter much to those who put him in the ground. He will rapidly become a depersonalized corpse.²⁷⁵ Those

who in life had the smallest or least influential social circle, and especially those who through poverty or

²⁷² Harding, *supra* note 267, at 173. Even the coffin, Harding argues, recalls or retains the illusion of the physical existence of the deceased: “Lead coffins, which themselves survive indefinitely, but which conceal or disguise the decay of the body they contain, also preserved a physical focus for prayer and commemoration.” *Id.*

²⁷³ *Id.* at 172.

²⁷⁴ Graves were often unmarked during the medieval period, although more important graves would have been marked, placed within the church, with large elaborate tombs. DANIELL, *supra* note 150, at 146. “The marking of graves was not a universal habit; in the leper hospital cemetery at Chichester no grave markers were found.” *Id.* The bodies of criminals were often buried with lack of concern; their orientation was random, sometimes “their wrists were tied behind the backs and had been buried, or thrown, into the grave face first in the prone position. They also had not been prepared for burial or wrapped in a shroud, but had been thrown in fully clothed. . . .” *Id.* at 149 (citation omitted).

²⁷⁵ Those who die in prison, or who are executed in prison, surely qualify as individuals who have lost their influence in the world by being removed from it. It comes as no surprise to learn that prison cemeteries often did not identify those who were interred. Here is one description of a Texas prison cemetery in Huntsville that is being restored:

Over the first hundred years, the cemetery had become overgrown with brush and weeds. By the time of the cleanup, it was a struggle just to identify the locations of graves. Early graves had been marked with only a wooden cross. Those graves that could not be identified were marked with a simple white concrete cross. There are 312 such graves. Some graves were identified with the inmate’s prison number engraved on the cross while others had a tablet style headstone that was discontinued in the 1940’s. Captain Joe Byrd and his crew located over 900 graves. Only a handful of nineteenth century graves were identified [sic], though many inmates were buried here between 1853 and 1900.

Captain Joe Byrd Cemetery, TEX. PRISON MUSEUM, <http://www.txprisonmuseum.org/articles/cemetery.html> (last visited Nov. 13, 2018).

sickness had lost control over their own destinies and even over their living bodies, becoming dependent on charity or hospital care, were also those whose bodies after death were most likely to be treated pragmatically and impersonally.²⁷⁶

This process of depersonalization—even after death—is exactly what happened to the patients who died several centuries later in American mental institutions.²⁷⁷ Once inside the walls of the hospital, their social circles became small and lacking in influence. Poverty and sickness led them to lose control over their destinies, and even over their living bodies. And when they died, their corpses were dealt with pragmatically and impersonally, with nothing to mark their former existence but a small concrete rectangle bearing a number. Abandoned or forgotten asylum cemeteries seem to hold no persons at all because the state has not treated them as persons in their burials.

²⁷⁶ Harding, *supra* note 267, at 172. Harding was writing about Parisian burials from 1550 to 1670. *Id.* at 170. “In 1670, the first year of the Bills of Mortality, 21,461 people died in the whole of Paris; over 5,000 of these died in hospitals, including over 4,000 in Hotel Dieu.” *Id.* at 172. It was also true that scarce land forced Parisians in this period to be brutally pragmatic about mass interments; the city had almost 400,000 inhabitants, and had to bury eight to 15,000 bodies a year, with epidemics multiplying the numbers. *Id.* at 185. Individual graves simply were not possible, and thousands were buried in mass graves. *Id.*

²⁷⁷ Slave cemeteries contain quintessential “depersonalized” corpses. In a slave cemetery restoration project in South Carolina, archeology students learn about “surveying, field walking, photographing archaeological findings, drawing site plans and artifact cleaning.” Jamie Self, *Winthrop Students Map Historic Slave Cemetery in Brattonsville*, HERALD ONLINE (Feb. 13, 2011), <http://www.heraldonline.com/2011/02/13/2830744/winthrop-students-map-historic.html>. Traditional burial markers were notably absent. The sites were not planned to be excavated; rather the students were using ground penetrating radar, and also identified “ground depressions, tree stumps, field stones and anything that could be a grave marker.” *Id.* Even the color of soil could distinguish a burial: “When a body breaks down, volatile fatty acids mix with the soil and discolor it, producing an outline of the remains . . .” *Id.* While the dominant culture did not value the Africans who were brought here as slaves, it did not mean that their corpses were “depersonalized” among the Africans themselves. The Gullahs of the South Carolina Low Country lived on a fringe of islands between Charleston and Savannah; it is thought they were originally Africans from the Kongo-Angola region, Bantu-speaking people. MARGARET WASHINGTON CREEL, *A PECULIAR PEOPLE: SLAVE RELIGION AND COMMUNITY CULTURE AMONG THE GULLAHS* 15 (1980). “Africans believed that the spirit which survived the body was conscious of all earthly events and had the power to exercise influence over the destiny of the living. Consequently, the death of a clan member was observed with greatest respect and the death commemoration had to be expressed collectively.” *Id.* at 316. This meant that ancestors retained their normal passions and appetites that had to be gratified in death, as in life, and on newly formed graves, the Gullah and other African-Americans put objects, “usually personal belongings, broken pottery and porcelain, playthings, lighting utensils, objects pertaining to medicine, food, and water.” *Id.* Seashells were often put on graves as well, expressing “immortal existence.” *Id.* at 319.

They repose anonymously, buried in a vast lawn park cemetery that was designed for ease of mowability in the land of depersonalized dead.

The distinguished Harlem Renaissance artist William Henry Johnson (1901-1970), for example, is buried in the Central Islip Hospital Cemetery, but until recently, no one knew where.²⁷⁸ An African American from rural South Carolina, Johnson overcame racism, a lack of formal education, and poverty to become recognized (posthumously) as one of the great American artists of the twentieth century.²⁷⁹ Living both in Europe and in New York, Johnson's landscapes of Norway and Denmark, and his later witty and intimate portrayals of daily life in Harlem, are part of a Smithsonian traveling collection.²⁸⁰ After the death of his wife in 1944, Johnson's financial and emotional well-being declined dramatically; he fell ill, and spent the last twenty-three years of his life institutionalized in the Central Islip State Hospital.²⁸¹ William Henry Johnson was a famous painter,

²⁷⁸ William H. Johnson, SMITHSONIAN AM. ART MUSEUM, <http://americanart.si.edu/collections/search/artist/?id=2486> (last visited Nov. 13, 2018). "Johnson spent the late 1920s in France, absorbing the lessons of modernism," and meeting his Danish wife, artist Holcha Krake; the couple lived in Denmark through most of the 1930s where Johnson actively painted and exhibited, and became interested in primitivism and folk art. *Id.* The couple left Denmark due to the coming threat in Germany in the year 1938 and came to New York where they lived near Greenwich Village on West 15th Street. STEVE TURNER & VICTORIA DAILEY, WILLIAM H. JOHNSON: TRUTH BE TOLD 37 (1998). Johnson got a job teaching art to children at the Harlem Community Art Center, taking the long subway trip uptown. *Id.* at 37.

What an impact this must have made on him as he left the downtown, white world and entered the black community again. . . . Always sensitive to his environment, Johnson began to portray the signs of life, the little dramas of everyday existence Johnson also began to create images remembered from his rural past in South Carolina, pictures inspired by going to church, farming and simple country living.

Id. at 37-38. Research performed by the late Beth Mobley located Johnson's grave at #5405.

²⁷⁹ THE WILLIAM H. JOHNSON FOUND. FOR THE ARTS, <http://www.whjohnsongrant.org/whjohnson.html> (last visited Nov. 13, 2018). "Known primarily for his majestic Scandinavian landscapes and his witty and poignant scenes of African American daily life, Johnson has made an indelible impact on American art. Yet he is one of those rare artists whose influence can be felt beyond his art, for his life story has elements of a purely American drama which inspires and encourages anyone familiar with it." *Id.*

²⁸⁰ William H. Johnson: An American Modern, SMITHSONIAN INSTITUTION TRAVELING EXHIBITION SERV., <http://sitesarchives.si.edu/exhibitions/exhibits/williamHJohnson/index.html> (last visited Nov. 13, 2018). "This exhibition of twenty expressionist and vernacular landscapes, still life paintings, and portraits explores the intricate layers of Johnson's diverse cultural perspective as an artist and self-described 'primitive and cultured painter.'" *Id.*

²⁸¹ *Id.*

By the time of his death in 1970, he had slipped into obscurity. After his death, his entire life's work was almost disposed of to save storage fees,

someone whose grave would usually be personalized, but because he died in obscurity in a state mental institution, his remains are somewhere on the other side of our law school's parking lot, under a number, one of over 5,000 anonymous former patients who cannot be identified. It is easy to feel outrage over Johnson's anonymous grave; he was one of the foremost American painters of the twentieth century. But he was also a former mental patient, and along with all those others—over 55,000 of them buried in the forgotten asylum cemeteries throughout the State of New York alone—his grave bears no name. His final resting place is indistinguishable, and burdensome to locate—the law school has the right to grant access to the cemetery, but a visitor would have to ask permission, go through a locked gate and be photographed by a security camera.²⁸² It would take a lot of dedication to honor William Henry Johnson's memory at his grave. For most of the other former mental patients who died in New York's asylums, such a visit would be virtually impossible.

But does William Henry Johnson care? What about the buried dead themselves? Are they capable of knowing about their plight, and does it cause them sorrow? How one answers those questions depends on one's religious and/or metaphysical views. Belief in an afterlife, or in some form of consciousness after death, could lead one to conclude that the absence of a headstone at a grave site might aggrieve the individual who was buried in that location. Throughout western history, "a prominent strategy for interpreting the meaning of death has been to encourage a division between the body and the soul, thus ensuring the possibility of some form of individual continuity and judgment after death."²⁸³ If we ascribe to some form of individual continuity after death, it does not seem wildly unlikely that a dead person would want a headstone above his grave, locating his remains, making a proper identification, marking his dates, ensuring that he might be visited by family members—that he might be remembered.

but it was rescued by friends at the last moment. Over a thousand paintings by Johnson are now part of the collection of the Smithsonian Institution's Smithsonian American Art Museum.

Id.

²⁸² The Touro Law Center entered into a Memorandum of Understanding circa 2014 with the New York State Office of Mental Health which allows the school to grant access to the cemetery. OMH has also given the Touro Law Center a grant to erect a new fence and gate and security cameras. The estimate of 55,000 dead buried in the former state mental hospital cemeteries in New York was given to us by John B. Allen, then Special Assistant to the Commissioner, New York State Office of Mental Health in December 2011.

²⁸³ LADERMAN, *supra* note 160, at 51.

It also does not seem wildly unlikely that a dead person would be aggrieved if his cemetery became abandoned or forgotten. If the dead person is still capable of knowing about, and feeling sorrow for his state of affairs, we ought to add him to the list of stakeholders harmed by the abandonment or loss of his resting place. But if it turns out that nothing happens after death except decomposition—that there is no afterlife or individual continuity after death, the dead person will not know, or care, whether there is a headstone above his grave, or that his cemetery is abandoned or forgotten. Like some of the others on the list, he ceases to be a stakeholder because he no longer has any interests at all.

For purposes of making public policy, we are never going to reach consensus on—or for that matter be able to learn in any timely fashion—what happens to the individual’s continuity when he dies. The only people who *could* know the answer to that question are dead, and not forthcoming. I, for one, would not rule out the possibility that the dead in the Central Islip State Hospital cemetery know their plight.²⁸⁴ I do not accept their silence as evidence that those dead people are not talking, but as evidence that I cannot hear them. Neither would I take them out of the stakeholder equation. However, I recognize that others—perhaps most—do not share my openness to this possibility. As we grapple with how to deal with the forgotten asylum cemeteries, and the anonymity of the individuals buried in them, we ought to be aware that we are forming public policy with no consensus on whether the dead are stakeholders. Our pluralistic

²⁸⁴ Asylum cemeteries are favorites of ghost hunters, so I am not alone in believing that the dead may still hang around. The now abandoned asylum in Bartonville, Illinois has a resident ghost known as “A. Bookbinder.” Phil Luciano, *Luciano: Asylum Gives Rise to Ghost Legend*, PJSTAR.COM (Oct. 27, 2010, 11:51 PM), <http://www.pjstar.com/news/x2115299147/Luciano-Asylum-gives-rise-to-ghost-legend>. An illiterate, mute patient who came from the poorhouse dubbed A. Bookbinder, or “Old Book,” because he had once worked in a print shop, his job was to dig graves of the patients in the asylum. *Id.* When Old Book dug a grave, he would become overcome with grief, leaning on an old elm tree, “unable to calm himself, he would burst into loud lamentations, howling from the core of his soul.” *Id.* When Old Book himself died in 1910, over 300 people attended his funeral, including 100 uniformed nurses, and as they lowered him into the grave, his “coffin . . . bounded into the air, like an eggshell, as if it were empty . . .” *Id.* (first alteration in original) (internal quotation marks omitted). Old Book was then seen, leaning against the old elm tree, lamenting his own death; the wailing finally stopped when they opened his coffin. *Id.* This ghost story was originally reported by the Hospital’s superintendent, Dr. George Zeller, and remains one of the most famous hauntings of Central Illinois. *Id.* Kings Park State Hospital is one of Long Island’s top ten most haunted places, according to paranormal investigators. Linda Tagliaferro, *Most Haunted Places on Long Island, NY.*, ABOUT.COM, http://longisland.about.com/od/landmarks attractions/ss/Most-Haunted-Places-On-Long-Island-Ny_2.htm (last updated Oct. 8, 2018).

society ensures and protects a wide range of religious and/or metaphysical views; it would be inappropriate to choose one assumption over the other—that either the buried former mental patients are aggrieved by their anonymity and the abandonment of their cemeteries, or they are not. The only approach with integrity—and respect for others—is agnosticism. We will have to embrace the unknowability of the answers to these questions, at least until such time in the future when the void of information is filled—when we ourselves are dead. At that time, however, it will be too late: presumably we will no longer be making public policy.

And what is to be done about the state of their anonymity? In the past, New York was one of several states in the eastern part of the United States that took the position that asylum burial records, including the names and birth/death dates and locations of former mental patients in its hospitals, could not be released. The New York State Office of Mental Health argued that that the stigma of being institutionalized in a mental hospital was too great to allow the public access to the roster of former inmates. Relatives, particularly in rural parts of the state, might not have wanted information to be released about a former family member who was once institutionalized—and their privacy must be protected.²⁸⁵ This meant that the burial records of the Central Islip State Hospital were under the strict control of the New York State Office of Mental Health. This rigid position was opposed by some fierce advocates for former psychiatric patients interred in state hospital cemeteries. History buffs in upstate New York formed The Willard Cemetery Memorial Project Committee and lobbied state legislators over a period of several years for a law that would allow for the publication of the names of deceased patients from the state's mental asylums.²⁸⁶ They were only partially successful,

²⁸⁵ The State Office of Mental Health oversees some two dozen hospital cemeteries and had consistently denied any requests for the release of patient names, and dates of birth and death, of any of the over 55,000 former deceased psychiatric patients who are buried in unmarked graves throughout the state, citing privacy concerns: “‘Stigma and discrimination is alive and well, though I wish it were not,’ said John Allen, special assistant to the commissioner of mental health. ‘Outing every family, whether they want to be outed or not, does not conform with the reality.’” Dan Barry, *Restoring Lost Names, Recapturing Lost Dignity*, N.Y. TIMES (Nov. 27, 2014), <https://www.nytimes.com/2014/11/28/us/restoring-lost-names-recapturing-lost-dignity.html>

²⁸⁶ Staff Reports, *Willard Cemetery Names to be Released*, ITHICA.COM (Sept. 13, 2016), https://www.ithaca.com/news/south_seneca/willard-cemetery-names-to-be-released/article_2e6300b4-7511-11e6-a1a5-0b8705ea5d57.html. The effort to lobby for the release of patient names, and their dates of birth and death, was led by Colleen Spelley, a retired teacher, who

however. In 2016, Governor Andrew M. Cuomo signed Bill 840-A, an amendment to the Mental Hygiene Law, allowing the release of the names and birth and death dates of former psychiatric patients buried in state hospital grounds “on request by a representative of a cemetery organization or funeral establishment . . . only for the purpose of inscribing the name or date on a grave marker,” unless the person’s guardian gave written instructions not to release the name or dates.²⁸⁷

headed up The Willard Cemetery Memorial Project. Louis DiPietro, *They Lived: Group Fights to Honor the Unnamed 5,776 in Asylum Cemetery*, ITHACA.COM (Dec. 23, 2014), https://www.ithaca.com/news/they-lived-group-fights-to-honor-the-unnamed-in-asylum/article_a56e2400-8a20-11e4-9482-6f371cb1ec7a.html. Some of the members of the group were disappointed in how narrow the legislation was, arguing in favor of a provision for a searchable database available to the public—something that the amendment to the Mental Hygiene Law did not provide. See Linda S. Stuhler, *Good Bye!*, INMATES WILLARD 1870-1900 (Oct. 12, 2016), <https://inmatesofwillard.com/tag/willard-state-hospital-cemetery/>.

The Willard Cemetery Memorial Project was not the only group involved in advocating for releasing patient names of former psychiatric patients buried in state cemeteries who met with resistance from the State Office of Mental Health. For example, the graves of the 1,643 former mental patients buried in the Rockland Psychiatric Center are all marked with small grey bricks “buried level with the ground and obscured by the roughly mown grass.” Hema Easley, *Advocates Seek Dignity for Rockland Psychiatric Center Patients Buried in Anonymity*, LOHUD.COM (Sept. 30, 2011), <http://www.lohud.com/article/20110930/NEWS03/109300337/Advocates-seek-dignity-Rockland-Psychiatric-Center-patients-buried-anonymity> [<https://web.archive.org/web/20111001005350/http://www.lohud.com/article/20110930/NEWS03/109300337/Advocates-seek-dignity-Rockland-Psychiatric-Center-patients-buried-anonymity>]. Unfortunately, these grey bricks had flat metal numbers attached to them, and most of those numbers have fallen off, “rendering the dead as invisible in death as they were in life.” *Id.* The Rockland Psychiatric Center, like the Long Island farm colonies, had a large patient population at one time, as many as 9,000 in 1959; there are only 450 patients housed there now. *Id.* An advocacy group for the mentally ill also sought to “give the unmarked graveyards names,” but “[t]he effort will not be without challenges,” citing the New York State Office of Mental Health’s former policy of relying on HIPAA to withhold the names. *Id.* “While a record exists of the patients buried at the cemeteries the state Office of Mental Health has informed the group it can put names and headstones only if family members of the deceased permit it.” *Id.* It is interesting to note that the 794 graves of those patients buried from 1965 to the present at another cemetery related to the Rockland Psychiatric Center reflect changing attitudes towards the mentally ill: “the graveyard has larger flat stone headstones carved with the names and lifespans of the buried, as well their religious affiliation denoted with a cross or a Star of David.” Easley, *supra*.

²⁸⁷ *S00840 Summary*, N.Y. ST. ASSEMBLY, <https://assembly.state.ny.us/leg/?bn=S00840&term=2015> (last visited Dec. 3, 2018).

Notwithstanding any other law, rule or regulation, on request by a representative of a cemetery organization or funeral establishment, the commissioner and directors of office facilities shall release to the representative the name, date of birth, or date of death of a person who was a patient at the facility when the person died, unless the person or the person’s guardian provided written instructions to the facility not to release such person’s name or dates of birth and death. A representative of a cemetery organization or a funeral establishment may use a name or

This law opened the door a narrow crack by releasing the names and dates of former asylum patients for limited purposes to cemetery organizations or funeral establishments only. But to date, New York State has opted *not* to provide an accessible, online database of former patient names, or in any way to treat the documentation of their burials in state psychiatric hospital grounds as “public records.”

The fact remains the state hospital cemetery at Central Islip is still gated and locked. How to locate a patient’s grave continues to be problematic—the amendment did not address the issue of site identification.²⁸⁸ Presumably, if a family member wants to know the grave number that corresponds to the body of his ancestor, he must petition the Office of Mental Health to assist him in locating that grave to the degree it is possible. (And being a family member could matter; merely curious genealogists with no familial connection may not be given access to that information.) The records are scattered, some in Albany and some at Pilgrim State, and unreliable. Over the years, several numbering systems have been used, and for many of the graves, the key to connecting the old numbers with the corresponding new ones has been lost. Anecdotally, stories abound about more than one patient being buried in a grave; similarly, some of the numbered gravesites are said to have no body whatsoever.²⁸⁹ Still, with research, and some access to the records, it should be possible to determine to a

date released under this subdivision only for the purpose of inscribing the name or date on a grave marker.

N.Y. MENTAL HYG. LAW § 7.09(k) (McKinney 2018).

²⁸⁸ Another former hospital cemetery in New York, that of the Gowanda Psychiatric Center, is under lock and key, owned by the state of New York, and “maintained by the state Department of Corrections, which operates Collins and Gowanda correctional facilities on the site of the former hospital.” Barbara O’Brien, *A Life Lived in Institutions, Forgotten by Almost All*, BUFFALO NEWS (July 1, 2012, 12:00 AM), <http://lunaticfringe.wordpress.com/cemetery-restoration/>. “Visitors must have permission from the prison before going to the cemetery.” *Id.* There are probably 1,200 former patients buried in what once were the hospital grounds, and the cemetery is being restored by the community, including the Mental Health Association in Cattaraugus County. *Id.* The cemetery’s restoration, and identifying a family member’s grave, brought one patient’s great nieces some peace: “‘I feel like she’s been liberated a little bit,’ Deschamps said. ‘At least now when you say a prayer, you know that her soul’s out there and hearing it and free to accept that prayer. Somebody knows about her. She wasn’t a forgotten soul. She’s still remembered.’” *Id.*

²⁸⁹ This information about the logistics of locating the graves of family members came from a December 12, 2011 meeting at Touro Law School attended by John B. Allen, the then Special Commissioner to the Office of Mental Health, Tom O’Clair, a Family Affairs Advocacy Specialist, the author, Dean Kenneth Rosenblum, Dean Linda Howard-Weissman, research assistant Emil Albanese, Andrew Schultz, the Executive Director of the Community Alliance for Jewish-Affiliated Cemeteries, as well as a staff member from Pilgrim State.

reasonable degree of certainty, an approximate location of a family member's body. It should also be possible—and has been done in a few rare instances—to erect a headstone that names the person buried at the site, with birth and death dates. Some family members clearly want to do this, and a few dogged ones have done so. The genealogy chat rooms are full of the frustration of family members over their inability to get into the cemeteries at the old Long Island farm colonies, however, and the inability to locate, or to commemorate, their dead.

Not all states agree with New York's conservative position on the public's right of access to burial records of former mental patients. The issue was litigated in Nebraska, in the case of *Adams County Historical Society v. Kinyoun*.²⁹⁰ This lawsuit centered around the cemetery of the Hastings Regional Center (HRC) where 957 former patients from the hospital, founded in 1887 as an "asylum for the incurably insane," were buried in graves marked only by patient numbers.²⁹¹ The burial records were maintained by Nancy Kinyoun, custodian of records at the HRC; they consist of handwritten journals listing patient names, dates of death, and medical record numbers.²⁹² The records also contain "maps with the graves and patient numbers which can be compared to the records in the journals."²⁹³ The plaintiff, the Adams County Historical Society (hereinafter "ACHS"), was a nonprofit dedicated to preserving the history of Adams County and the surrounding area. ACHS made a request of Kinyoun for the burial records "to collect and preserve historical data."²⁹⁴ Kinyoun, along with the Nebraska Department of Health and Human Services, denied the request, claiming that state and federal privacy laws, including the federal Health Insurance Portability and Accountability Act of 1996 (hereinafter "HIPAA"), prevented the release of the records that constituted "protected health information."²⁹⁵ The plaintiffs were

²⁹⁰ 765 N.W.2d 212 (Neb. 2009).

²⁹¹ *Id.* at 214-15.

²⁹² *Id.*

²⁹³ *Id.* at 215.

²⁹⁴ *Id.*

²⁹⁵ *Kinyoun*, 765 N.W.2d at 214-16. And surely many of the patient records from state hospitals did constitute private medical records, and even those were not always treated respectfully. Some of the medical records from Danvers State Hospital in Massachusetts were taken from the abandoned state hospital which closed its doors in 1992, and showed up in an auction on line. For sale was a 1977 "record book containing patients' names, doctors' notes, and prescription doses . . ." Chris Cassidy, *State Vows Clean Sweep to Keep Records Out of Wrong Hands*, SALEM NEWS (Apr. 7, 2006), http://www.opacity.us/article44_state_vows_clea

joined in their suit as *amici curiae*, among others, the Reporters Committee for Freedom of the Press.²⁹⁶

The Nebraska Supreme Court in *Adams County Historical Society v. Kinyoun* held that the burial records of the former patients of a state asylum were death records, and as such public records subject to release.²⁹⁷ Kinyoun had argued that because all of the persons buried in the asylum cemetery had been patients at HRC when they died, releasing their names was the equivalent of releasing medical records, but the Nebraska Supreme Court was not persuaded.²⁹⁸ As to the federal claim, HIPAA was deemed to apply only to medical records and to patient histories, and not to records of deaths.²⁹⁹ Regarding state law, the Nebraska Supreme Court first reasoned that the information sought from the burial records was more limited than the information

n_sweep_to_keep_records_out_of_wrong_hands.htm. The Massachusetts Department of Mental Health promised to search all abandoned state hospitals; apparently the abandoned buildings were not properly policed or boarded up. *Id.* “‘This is a disgrace,’ said Sarah Wunsch, a staff attorney for the Massachusetts chapter of the American Civil Liberties Union. ‘If the state’s going to shut down buildings that house patient records, they need to take adequate steps to take care of those records and make sure confidentiality is protected.’” *Id.*

²⁹⁶ *Kinyoun*, 765 N.W.2d at 213. The decision does not mention the arguments made by the *amicus* brief that included as signatories “the American Society of Newspaper Editors, The Associated Press, the Nebraska Broadcasters’ Association, the Nebraska Press Association, the Radio-Television News Directors Association, and the Society of Professional Journalists” Laura L., *Amicus Briefs: A Brief Word from your Attorney*, CAPITOLBEAT (Jan. 9, 2009, 6:04 PM), <http://capitolbeat.wordpress.com/2009/01/09/326/>. Aside from combating the argument that HIPAA applied, and that as burial records, they constituted public records, the journalists focused on the right of the press to investigate what goes on in public institutions. *Id.* Capitolbeat, another signatory on behalf of the press to the *amicus* brief, characterized their argument thus:

There is a strong public interest in release of these records, as the information contained in the records can shed light on the State of Nebraska’s treatment of those held in its mental health institutions, some of whom were likely committed against their will. As the brief states: “When the state’s power is used so forcefully, it must be clear to the public who it is used against to prevent misuse.” Release of these records allows the press and public to serve as a watchdog with regard to the state mental health system and the expenditure of state funds generally.

Id.

²⁹⁷ *Kinyoun*, 765 N.W.2d at 218-19. Much of the decision was devoted to whether this action was appropriate for a writ of mandamus, and the court relied upon section 84-712.03 of the Nebraska statutes, stating that “[a]ny person denied any rights granted under the public records statutes may either file for a writ of mandamus in the district court with jurisdiction or petition the Attorney General to review the matter.” *Id.* at 216 (quoting NEB. REV. STAT. ANN. § 84-712.03 (West 2012)). After finding the statutory remedies exhausted, the Nebraska Supreme Court found the writ of mandamus to be properly before them. *Id.*

²⁹⁸ *Id.* at 217.

²⁹⁹ *Id.* at 218.

available on a death certificate, already a public record; death certificates require the Social Security number of the deceased, as well as the cause of death, and the place of burial or removal.³⁰⁰ Second, the court pointed out that patients were admitted to HRC for a variety of reasons, including “issues related to substance abuse, senility and dementia relating to old age, various psychotic disorders, ‘mental deficiencies,’ and other undiagnosed mental disorders.”³⁰¹ That the deceased persons were treated at HRC “did not indicate the nature of their diagnosis, or even the causes of death—information routinely released via death certificates. Furthermore, the records sought by ACHS did not include diagnosis or treatment information, but instead were limited to the names of the deceased and the locations of burial.”³⁰² Thanks to this litigation, it is now possible for any member of the public to have online access to the burial records of the Hastings Regional Center.³⁰³

Other states have adopted the Nebraska approach in making the burial records of former asylum patients a matter of public record.³⁰⁴ Oregon State Hospital, for example, had a policy of cremating the bodies of those mental patients who died in the institution and were unclaimed by their families.³⁰⁵ Approximately 3,500 mental patients had died in this hospital, and other Oregon state hospitals, between

³⁰⁰ *Kinyoun*, 765 N.W.2d at 217-18.

³⁰¹ *Id.* at 218.

³⁰² *Id.* The court also pointed out that the plaintiffs had two other cases in their arsenal to rely upon in which courts have allowed the information to be released in spite of privacy concerns due to the application of state open records laws, although neither case concerned the release of burial records: *Abbot v. Tex. Dep’t of Mental Health*, 212 S.W.3d 648 (Tex. App. 2006); *State ex rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181 (Ohio 2006).

³⁰³ Catherine Renschler, *The Hastings Regional Center*, ADAMS COUNTY NEB. HIST. SOC’Y, <http://negenweb.net/NEAdams/regional.htm> (last visited Nov. 13, 2018).

³⁰⁴ In Topeka, Kansas, for example, the former employees of the Topeka State Hospital raised money to erect a granite memorial to remember the 1,157 former patients of the hospital who were buried anonymously there from 1879 to 1954. Phil Anderson, *Marker Sought for Topeka State Hospital Cemetery: 1,157 Patients Buried there from 1879 to 1954*, CJonLINE.COM (Sept. 30, 2012), <http://cjonline.com/news/2012-09-30/marker-sought-topeka-state-hospital-cemetery>. The names of each of the patients buried mostly in unmarked graves are inscribed on the memorial; “‘All these people need to be remembered,’ [one of the advocates,] Shelton said, ‘They had no family, no money, to be buried in their hometown, so they were buried here on the hospital grounds.’” *Id.* Apparently the state of Kansas had no problems with the inscription of patient names on the memorial.

³⁰⁵ Michelle Cole, *Oregon State Hospital Tries to Reunite Families with Cremated Remains of Past Patients, but Errors on List May Make It Difficult*, OREGONIAN (Mar. 31, 2011, 10:18 PM), http://www.oregonlive.com/politics/index.ssf/2011/03/oregon_state_hospital_tries_to.html.

1914 and the 1970s; their cremains were then stored in the hospital until 2004.³⁰⁶ When they were discovered inadvertently, Oregon Senate President, Peter Courtney, dubbed their storage space as the “Room of Forgotten Souls,” and sponsored legislation to make public the names of former patients who had been cremated and stored by the state hospital.³⁰⁷ The legislation was designed to finesse the argument that disclosing the records of cremains would violate medical confidentiality laws.³⁰⁸ In January of 2011, those names were published online, although a local newspaper spot-checked 177 of the names with the Oregon Death Index and the Oregon State Archives in Salem, and discovered that twenty-five percent of the names did not match state death records, reflecting the reality that old state hospital records are frequently in disarray.³⁰⁹ Compiling the list of names was not easy. With no additional financial resources, it took the hospital officials more than two years to create the lists from old medical records, cremation logs and labels on the canisters, using part-time temporary workers.³¹⁰ Since the lists were made public in 2005, family members have claimed the remains of 120 patients.³¹¹

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* Oregon passed legislation that allowed the Oregon State Hospital to create a website, listing alphabetically by last name the unclaimed cremains of individuals who had died while living at Oregon State Hospital, Oregon State Tuberculosis Hospital, Mid-Columbia Hospital, Dammasch State Hospital, Oregon State Penitentiary, and Fairview Training Center between 1914 and the 1970s. *Honoring the Past—List of Unclaimed Cremains*, OR. HEALTH AUTHORITY, <https://www.oregon.gov/OHA/OSH/Pages/Cremains.aspx> (last visited Nov. 13, 2018). The Oregon legislature passed a law allowing the hospital to “disclose this information, which is protected by privacy laws” *Id.* The Oregon statute states:

(1) Notwithstanding any other provision of law, the Department of Human Services shall disclose to the general public the name and the dates of birth and death of a person whose cremated remains are in the possession of the department for the purpose of:

(a) Giving a family member of the person an opportunity to claim the cremated remains; and
(b) Creating a memorial for those persons whose cremated remains are not claimed.

OR. REV. STAT. § 409.742 (2018).

³⁰⁹ Cole, *supra* note 305. Some of the mismatches may have been due to human error and confusion about names. For example, one patient was listed by the hospital as “Rita Zozdinski,” who died on December 21, 1952; the Marion County death certificates have no such record, but there was a death certificate of a Rita Mae Jazdinski, who died the same day. *Id.* Who was Rita? “She was 6 years old and had been at the Oregon Fairview home for three years. No one claimed her body.” *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

The story of one Oregon man who claimed the ashes of both his older brother and his grandfather from the forgotten cremains in the Oregon State Hospital gives some human dimension to these “stakeholders.”³¹² Don Whetsell, aged seventy-three, claimed the remains of his older brother, Kenneth, who in 1934 was sent to the state hospital when he was age ten with epilepsy, and who died the next year, and his grandfather, who also ended his days in the state hospital, suffering from dementia. “They were there one day and gone the next,” said Whetsell, who was “too young at the time to comprehend where his brother and grandfather had gone.”³¹³ “My mom just didn’t like to talk about Kenny, so I just accepted the fact that it was a hurt point for her.”³¹⁴ After he learned of the location of both his brother’s and his grandfather’s cremains, “Whetsell saved money for a plot and buried his grandfather’s ashes along the Oregon coast next to his grandmother, ‘where he belonged,’” but he is saving to bury his brother next to their parents’ grave.³¹⁵ “If I can do it now, it will make up for us not doing it when we should have,” he said, not knowing why his family never claimed the ashes, but assuming it was due to poverty.³¹⁶ While looking at his brother’s ashes, Whetsell said tearfully, “You can’t imagine—even with Kenny being gone that long and me being so much younger and not having that much life with him . . . [h]ow much you can love someone like that.”³¹⁷

A similar incident with casually stored, unclaimed patient cremains took place in Hawaii, although with more disastrous results.³¹⁸ At the Hawaii State Hospital, from 1930 to 1960, the

³¹² Stephen Caesar, *Shelves of Forgotten Souls*, L.A. TIMES (May 13, 2011), <http://articles.latimes.com/2011/may/13/nation/la-na-cremated-remains-20110514/2>.

³¹³ *Id.*

³¹⁴ *Id.* (internal quotation marks omitted).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Caesar, *supra* note 312 (internal quotation marks omitted). The Oregon State Hospital is planning a memorial to honor those patients “whose remains were unclaimed for decades and those that may never be claimed.” *Honoring the Past*, *supra* note 308. This project, in collaboration with the Oregon Arts Commission, is funded by the Percent for Art in Public Places, and is accounted for in the new hospital’s construction budget. *Id.*

³¹⁸ The graves of the 4,400 former patients of Eastern State Hospital in Lexington, Kentucky, were also somewhat haphazardly dug, and “many people there have been reburied at least three times, ashes are mixed and it is essentially a mass grave” Valarie Honeycutt Spears, *Artist Group Fashions Apologies to Patients Buried at Eastern State Hospital*, HERALD LEADER (June 22, 2012), <http://www.kentucky.com/2012/06/22/2234887/artist-group-fashions-apologies.html>. A group of artists fashioned a necklace out of 4,400 small

unclaimed bodies of 668 former psychiatric patients who died at the former Territorial Hospital of Hawaii had been cremated, and their remains warehoused in the hospital's basement.³¹⁹ Over time, the ashes spilled from the broken urns onto the floor, mixing altogether, the labels identifying the patients becoming undecipherable.³²⁰ When the situation became public knowledge, the Hawaii legislature allocated funds to bury the patients at the Hawaiian Memorial Park in Kaneohe, and there is an annual memorial service for them. "I've heard it said, 'They were disrespected when they were alive and then disrespected in death,' said Kim Noble, chaplain of the Hawaii State Hospital."³²¹ "This is our way of respecting them."³²² While individual sets of ashes could not be reclaimed, the names of all those cremated in the hospitals records were made public.³²³ The hospital sponsors an annual ceremony to celebrate the lives of the "hundreds of former indigent Hawaii State Hospital patients once deemed unworthy of even a simple burial."³²⁴

The state of Ohio has taken a hybrid approach to making public the burial records of those interred in former state hospitals. The Toledo State Hospital Cemetery Reclamation Project, as well as the State Library of Ohio in Columbus, has made available an online list of all the names of people who are buried in the two Toledo State Hospital Cemeteries, representing the largest number of such burials in Ohio.³²⁵ The database is:

the first step to finding one's ancestors and does not contain the full information available through the State Library records. Once a name and age has been found that matches a prospective ancestor, the next step is to contact the Cemetery Reclamation Project with proof of relationship to the person in question. We will then

cards, each bearing an artist's thumbprint, to represent "4,400 apologies for what some people say was a disregard for the bodies." *Id.*

³¹⁹ Nalea J. Ko, *Remembrance of those Cast Aside: A Ceremony Marks the Burial Site of Former Indigent Patients*, HONOLULU STAR BULL. (July 2, 2008), <http://archives.starbulletin.com/2008/07/02/news/story07.html>.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* (internal quotation marks omitted).

³²³ *Id.*

³²⁴ Ko, *supra* note 319.

³²⁵ *Cemetery Burial Log*, TOLEDO ST. HOSP. CEMETERY: RECLAMATION PROJECT, <http://www.toledostatehospitalcemetery.org/page39.html> (last visited Nov. 13, 2018).

forward the remaining information available through the State Library burial log regarding your ancestor, including a grave marker number.³²⁶

The list of almost 2,000 people is not a complete list of those who died in the hospital, since many were buried elsewhere.³²⁷ Fifty-seven graves were disinterred, but fifty-five of those were reused at the time of the next death; several individual graves were used three times due to repeat disinterment.³²⁸

Again in Ohio, the Friends of Athens Asylum Cemeteries (hereinafter “FAAC”) has spearheaded a movement to identify the almost 2,000 dead in the Athens, Ohio asylum cemetery.³²⁹ FAAC consists of volunteers whose mission it is to:

place a gravestone on every grave at The Ridges with the name of the person, birth date, and date of death (if available) engraved upon it. This additional stone would not replace the original numbered headstone but be placed in front of the old stone, flat upon the ground, so the historical integrity of the cemetery will be protected.³³⁰

Consistent with Ohio’s hybrid approach, the Ohio Department of Mental Health, which owns the cemeteries, expressed concern about protecting not only the historical integrity of the site, but also the:

privacy of the families of persons in the numbered graves. The FAAC has only received permission from the department to place stones when relatives of the dead can be found, the relatives can prove they are related, and they grant written permission to do so. The new markers must also conform to ODMH specifications. To date, an increasing number of new stones have been placed, with 43 stones for veterans

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Sharon K. Grossman, *Numbered Graves in Institution’s Cemetery to Receive Identities*, EXAMINER (Sept. 16, 2011), <http://www.examiner.com/article/numbered-graves-institution-s-cemeteries-to-receive-identities>.

³³⁰ *Id.*

currently on order, and the group has high hopes of locating many more relatives.³³¹

The FAAC also works with the National Alliance on Mental Illness, Athens, Ohio Chapter and the Ohio Department of Mental Health to get information out to the public about those buried in the cemeteries.³³²

We have seen, however, that the New York state legislature's recent amendment to the Mental Health Law has not been so bold: the burial records of those interred in former state mental hospitals are not currently considered public records; they are not published in any database accessible online to members of the public.³³³ Only representatives of cemetery organizations or funeral establishments may ask for the release of former patient's names and birth and death dates, and only for the purpose of memorializing them, or putting up a headstone. Unless and until the state changes its policy, a family member, a genealogist, or any member of the public cannot use public records to confirm the presence of a former patient who might be buried in the Central Islip State Hospital cemetery. In theory, a family member could ask the State Office of Mental Health for assistance in locating a grave, but aside from the 101 Jews who were buried by Rabbi Lerer in the 1980s and 1990s, only three or four other graves among the 5,000 have received upright memorial stones.³³⁴ Without

³³¹ *Id.*

³³² *Id.* The cemetery of the Athens Insane Asylum has been restored and is now maintained as the Ridges Cemeteries Nature Walk. The community effort was sponsored by public and private entities, including the 317 Board, Americorps, Appalachian Behavioral Healthcare, the Arnold Air Society, The City of Athens, the Civilian Conservation Corps, the Gathering Place, Hocking College, the Hocking Correctional Facility, the National Alliance on Mental Illness, the O'Bleness Foundation, the Ohio Department of Natural Resources, Ohio University and the Outback Conservation Corps. *Visitor's Guide*, NAT'L ALL. ON MENTAL HEALTH, <http://namiathensohio.org/projects/the-ridges-cemeteries/visitors-guide/> (last visited Nov. 20, 2018). One of the largest asylum cemeteries is the Cedar Lane Cemetery in Milledgeville, Georgia, where an estimated 25,000 to 30,000 patients from the Central State Hospital are buried in mass graves, marked only by numbered irons markers. This cemetery is marked with an historical marker and a life-sized guardian angel, and a restoration project is underway. Tatiana Danger, *Milledgeville's Cemetery For the Insane: Visiting the World's Most Macabre Memorial*, ROADTRIPPERS (Sept. 15, 2015), <https://maps.roadtrippers.com/stories/milledgeville-cemetery>.

³³³ See *supra* note 287 and accompanying text.

³³⁴ Among those few marked graves is the burial site of Edna Gertrude Beasley—a colorful teacher, National Geographic photographer, and author. Ash Montagu, *Edna Gertrude Beasley*, FINDAGRAVE.COM (July 17, 2008), <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=28340476>. After publishing her autobiography at a relatively young age, the weight of censorship in Texas, Britain, and the Soviet Union caused her to become distraught and

public access to the burial records, the numbers that mark their graves must remain—by and large, we cannot name the people who are in them.³³⁵ How then do we pay respect to these silent neighbors of ours? Is there some way to make the Central Islip State Hospital cemetery at least accessible, and to allow family members, and the public, to visit the grounds? Why are cemeteries holding the bodies of the mentally ill so different from other places where we honor our dead?

This brings us back to the question posed in the beginning of the essay: what are our moral obligations to these particular deceased people, the former patients of state psychiatric hospitals? Once we focus on this unique population of the dead, another set of stakeholders emerge—those who are suffering from mental illness today. In many ways, our outrage at the depersonalization of the graves in abandoned or forgotten asylum cemeteries, and our sense of deep regret over the loss of the patients' names, reflect a shift in attitude towards the mentally ill. No one today would seriously argue that those who suffer from mental illness should be forced to relinquish their personhood or identity. Yet the numbered concrete markers in a forgotten asylum cemetery like Central Islip State Hospital's bear witness to the fact that in the past, our society did just that. Unfortunately, when we consider other aspects of our former treatment of the institutionalized mentally ill, we must acknowledge that this history has not always been a source of pride, the brief episode of moral treatment notwithstanding. Indeed, much of that history has been a source of profound shame.

destitute, eventually being admitted to a hospital abroad. *Id.* The American consulate intervened, had her brought back to the United States, where upon return, she threatened to sue the British government and was taken to Central Islip State Hospital where she later died. *Id.*

³³⁵ Not only are the individual states beginning to set up systems to identify the former mental patients buried in their cemeteries, but federal institutions are as well. "Saint Elizabeth's, which opened in 1855, was the first federally funded asylum." *Remember...*, PSYCHODYSSEY SERVICES, <http://www.psychodyssey.net/remember-2/> (last visited Dec. 3, 2018). Located in Washington D.C., the Gardens of Saint Elizabeth Memorial of Recovered Dignity was dedicated in 2009, and while the gardens and reflection pool are not yet complete, the ten-acre cemetery for the 4,500 former patients of the asylum, some of them Civil War veterans, is already being restored. *Id.* The plan is to have metal markers from each state, listing the number of former psychiatric patients buried within their state, and at which institutions. *Id.* The National Park Service is also responsible for the maintenance of the cemetery of the Canton Asylum for Insane Indians in Canton, South Dakota, located in the center of a golf course, and again with a bronze plaque listing the names of the 120 former patients who were buried there. *Canton Asylum for Insane Indians*, NAT'L PARK SERV., <https://www.nps.gov/places/canton-asylum-for-insane-indians.htm> (last updated July 26, 2017).

We ought to own up to that shame, and in restoring the abandoned or forgotten asylum cemeteries, we make a symbolic gesture of apology to those who were not always treated well by the medical establishment, or by our state institutions charged with their care.³³⁶ By opening an asylum cemetery up to the public, by erecting monuments to commemorate the former patients who lived and died there, by allowing family members to find their ancestors and erect headstones, we make amends. Making amends *may* matter to the former patients who are buried in those cemeteries—I like to think it would. But even if it does not, making amends to those former patients *will* matter to those among us who suffer from mental illness. They should take heart that we share outrage at the depersonalization of the graves at former state hospitals, and a sense of repugnance over the loss of patients' names. We might even say that we are sorry. A public apology, opening asylum cemeteries to the public, remembering the lives of the former patients of New York's psychiatric hospitals—all of these gestures send a message: those who suffer from mental illness are valued members of the human family. Implicit in that message is a promise as well: we would never treat you this way today.

And so, the wind continues to murmur through the shuddering pines that shelter the forgotten graves of the patients from the Central Islip State Hospital. The distant hum of the cars on the Southern State Parkway can still be heard from the law school parking lot that borders the abandoned cemetery. Some of us know they are there.³³⁷ Coming

³³⁶ It was out of concern for the living who suffer from mental illness that the National Association of State Mental Health Program Directors ("NASMHPD") approved a Position Statement on July 31, 2001, on State Psychiatric Hospital Patient Cemeteries. *NASMHPD Position Statement on State Psychiatric Hospital Patient Cemeteries*, NAT'L ASS'N ST. MENTAL HEALTH PROGRAM DIRECTORS, <https://www.nasmhpd.org/sites/default/files/cemetaries.pdf> (last visited Dec. 3, 2018). The statement started with the premise that "[f]orgotten and neglected graves of persons who died in state psychiatric hospitals convey a message of devaluing the people who struggled with mental illness, contribute to the burden of stigma that people still face today, and perpetuate a negative image of the state hospital." *Id.* The reasons articulated for restoring the patient cemeteries included a "symbol of hope and recovery" for the "consumers and their families," as well as a "symbol of conveying dignity for consumers." *Id.* Among other recommended actions by the states, were to locate gravesites, which would be available to families and consumers; the restoration of the cemeteries; the provision of perpetual care; and if gravesites cannot be located, the construction of a memorial. *Id.*

³³⁷ And more of us will know a historical marker and a plaque, bearing this language approved by the New York Office of Mental Health, are erected at the entrance to the cemetery:

In memory of the 5,500 souls interred in this cemetery, mostly forgotten in life and anonymous in death, whose graves are marked only by numbered stones, may they rest in eternal peace.

and going, if only for a fleeting moment, we rummage through our cars for cups of coffee, computers and coats, and contemplate those 5,000 dead souls on the other side of that chain-linked fence. It is time for the neighbors to the north, and a few of their friends, to honor them—to cut down the shrubbery, unlock the gates, remove the grass from the graves, and let their families come in—to let us *all* come in. Maybe that will happen. For now, Touro Law Center, CAJAC, and the New York State Office of Mental Health have all agreed to work on this project—to initially restore the Jewish graves, with the goal of eventually opening up the entire cemetery as the Central Islip State Hospital Memorial Park. It is the least we can do for our silent neighbors to the south. For the time being, our project will focus on the Jewish dead who lie behind the broken gate that bears the Star of David. We know *their* names, thanks to the conviction of Rabbi Lerer who believed that those former psychiatric patients should not lose their individuality and dignity, even in death. And someday, we may even be able to address them all by name, to locate the place where they spent time on earth, where they now lie in the earth—to give them our respect, wherever they may be.

This is a potter's field that served the Central Islip State Hospital from the late 19th century until the hospital closed in 1996. The hospital, which stretched from Southern State Parkway north to Suffolk Avenue, covered over 1,000 acres and housed 10,000 patients, was once one of the largest psychiatric hospitals in the nation. The cemetery consists of 500 graves in a separate consecrated Jewish section, to the east, and 5,000 graves in the non-denominational section to the west. The cemetery is maintained by the New York State Office of Mental Health with the support of Touro Law Center.

The righteous perish, and no one takes it to heart; the devout are taken away, and no one understands that the righteous are taken away to be spared from evil. Those who walk uprightly enter into peace; they find rest as they lie in death.

Isaiah 57:1-2 (emphasis added).