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SPECIAL TREATMENT OF CEMETERIES

The cemetery business benefits from substantial government concessions, including tax relief and the grant of broad restrictive powers over the use of lots. These concessions in turn cause society at large to bear some of the economic and social costs of cemeteries.¹ Society should continue to bear these costs only if there is ample justification for excepting burial grounds from the general rules of taxation and property law.

I. SPECIAL TREATMENT: A VESTIGAL REMNANT

Due to tradition, sentiment, concern for the bereaved family's well-being, and religious considerations, courts and legislatures have given cemeteries special treatment.² Initially, these considerations were strengthened by the fact that early cemeteries were non-profit facilities, many being maintained on church premises.³ When municipally owned cemeteries began to supplement church cemeteries in the nineteenth century, graveyard charges remained nominal and cemeteries were not expected to show a profit.⁴

Court decisions still indicate that prices for cemetery services should be reasonable and that profit-making is offensive to public policy,⁵ yet eleemosynary activity can no longer serve to justify cemetery tax exemptions. Since 1900 private enterprise has entered the cemetery business on a large scale.⁶ While many proprietors are motivated by social consciousness to fill a community need, others are attracted by the potentially large profits possible through governmental concessions. By acquiring undeveloped land (or an old, unprofitable cemetery) at a low price and then re-selling to an associated non-profit corporation, private cemetery owners can gain huge profits from a small investment.⁷ Such "bootstrap" transactions en-

¹ This concern over the high cost of funeral and cemetery services has, in recent years, occasioned magazine articles and best-selling books including: Harmer, *The High Cost of Dying*, PROGRESSIVE, March 19, 1961, at 35; *Treuhaft, St Peter, Don't You Call Me*, FRONTIER, Nov. 1958, at 8; Tunley, *Can You Afford to Die?*, SAT. EVE. POST, June 17, 1961, at 24.

² Note, *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378 (1961).

³ The practice of churchyard burial began in England in 750 A.D., 30 TEMP. L.Q. 40 (1956).

⁴ J. MITFORD, *THE AMERICAN WAY OF DEATH* 123-24 (1963).

⁵ See, e.g., *Terwilliger v. Graceland Memorial Park Ass'n*, 35 N.J. 259, 265-67, 173 A.2d 33, 36-37 (1961); *Abra-May Cemetery Sales Co. v. Degel Yehudo Cemetery Corp.*, 92 N.J. Super. 365, 368-69, 223 A.2d 507, 508-09 (1966); *Di Cristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 255, 128 A.2d 281, 287 (1957); *Jewish Center of Mt. Vernon, Inc. v. Mt. Eden Cemetery Ass'n*, 15 App. Div. 2d 94, 102, 222 N.Y.S.2d 644, 652 (1961); *Diamant v. Mount Pleasant Westchester Cemetery Corp.*, 10 App. Div. 2d 404, 410, 201 N.Y.S.2d 861, 866 (1960).

⁶ J. MITFORD, *supra* note 4, at 123.

⁷ See text at 718.

able profit corporations, acting in concert with non-profit corporations, to avoid paying income taxes. Proprietors further increase their profits by engaging in other cemetery-related business activities.⁸

Tax exemptions for cemeteries might have initially been justified because cemeteries performed an essential community function of disposal, because there was a universal need for burial plots enabling all persons to benefit to approximately the same extent, and because there was no alternative to burial. Now, despite cheaper alternatives, services are often elaborate and burial costs vary greatly.⁹ Despite the economies achieved by modern "memorial parks,"¹⁰ the amount spent on death increased 224.7% between 1936 and 1962, while the number of deaths increased only 18.3%.¹¹ As people spend more, and services become more elaborate, it appears that tax exemptions subsidize more than the fulfillment of a basic and universal need.¹²

II. PROTECTION FOR THE PROFIT-MAKER

A. *Income Tax Exemption*

Income tax exemptions apply to religious,¹³ charitable, civic, and fraternal organizations.¹⁴ These exemptions reflect the judgment of Congress that such groups are socially desirable and are organized for non-profit purposes. They are justified on the grounds that these exemptions implement the national policy of benefiting and encouraging organizations whose purposes are exclusively altruistic.

The first income tax act following the ratification of the Sixteenth Amendment included a provision exempting cemeteries.¹⁵ Later revisions

⁸ See text at 719.

⁹ An indication of how inexpensive burial can be in modern times is shown by the cost of Los Angeles burials. In 1960 the county cremated 872 bodies for a cost of \$15.00 each plus \$11.89 for preparation and \$3.28 for transportation. For 381 persons, the county arranged burial in \$19.41 coffins and \$30.00 graves. In contrast, the average cost for all 51,549 burials in the county, including the county cases, was \$1,100. Harmer, *supra* note 1, at 37. In European countries with cultures similar to ours burial costs are dramatically lower. Tunley, *supra* note 1, at 82.

¹⁰ These economies include lower maintenance costs (only flush grave markers are permitted), new and more efficient operating methods (graves are mechanically dug in a few minutes), volume business, income from related endeavors (flowers, curios, wedding chapels, life insurance) and advance sales.

¹¹ "The cost of burial has soared, at a rate outstripping even the rise in undertakers' charges." J. MITFORD, *supra* note 4, at 125.

¹² See text accompanying notes 37-43.

¹³ INT. REV. CODE OF 1954, § 501(d).

¹⁴ INT. REV. CODE OF 1954, § 501(c).

¹⁵ 50 CONG. REC. 1239 (1913) (exempting only cemetery companies organized and operated exclusively for the mutual benefit of their members).

of the Internal Revenue Act demonstrated that this exemption was not intended to aid profit-makers.¹⁶ The Internal Revenue Code currently exempts cemetery companies not operated for profit, and cemetery corporations, chartered for burial purposes only, whose net earnings do not go to any private shareholder or individual.¹⁷ This exemption, however, has been used by cemetery owners to make substantial "personal" profits.¹⁸

Promoters, operating for a profit, have gained the advantage of the cemetery tax exemption through "bootstrap transactions"—a series of transactions between related corporations. Typically, a promoter acquires, and holds in his own name, undeveloped land (or an existing cemetery). He then forms a non-profit cemetery corporation, and sells the property to the new corporation at an inflated price. Since the new non-profit corporation has few assets, the promoter takes long term notes payable out of revenues from lot sales and related business activities in satisfaction of the purchase price. Thus, current income passes through the exempt corporation and is taxed at capital gains rates to the promoters. For instance, certain promoters purchased an unsuccessful cemetery corporation for \$180,000 and promptly resold it to a non-profit organization for \$709,000;¹⁹ another case allowed the cemetery exemption where the non-profit cemetery corporation gave its note for 50% of the proceeds of all lot sales to the promoters, and paid as annual rent 10% of the costs of all buildings and equipment the promoters owned.²⁰

¹⁶ An amendment in 1921 changed the act's language to read substantially as it now does. Revenue Act of 1921, ch. 136 § 231(5), 42 Stat. 253. Debates concerning addition of words to exempt cemeteries "not operated for a profit" indicate the purpose of the amendment was to exempt those cemeteries which buried paupers for free, and therefore were not "exclusively for the benefit of its members." 61 CONG. REC. 7487-90 (1921). There was heated debate over adding the phrase of the Act exempting corporations "chartered solely for burial purposes." Some Senators thought that this would exempt from taxation "the people who make money out of the burial of the dead." 61 CONG. REC. 7489 (1921) (remarks of Senator Lodge). Only after all the Senators involved were assured that the added wording would not have that effect did they vote for the amendment. It was made clear that the amendment was not intended to exempt profit-makers. The Senator who introduced the compromise amendment stated that it would not be proper if a "corporation which was organized and purchased some beautiful spot for a cemetery for \$10,000 in acreage, and immediately sells burial lots for \$200,000, should be excused from paying a tax on the profit it makes." 61 CONG. REC. 7489 (1921) (remarks of Senator McCumber).

¹⁷ INT. REV. CODE of 1954, § 501, exempts, *inter alia*,

Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual. INT. REV. CODE of 1954, § 501(c)(13).

¹⁸ Lanning, *Tax Erosion and the "Bootstrap Sale" of a Business*, 108 U. PA. L. REV. 623, 638 (1960).

¹⁹ Washington Park Cemetery Ass'n, 22 CCH TAX CT. MEM. 1345 (1963).

²⁰ Forest Lawn Memorial Park Ass'n, 46 P-H TAX CT. MEM. 699 (1946).

In addition, the non-profit cemetery corporation often engages in related profitable businesses, such as: maintaining mortuaries, selling caskets, flowers, and religious artifacts, and renting wedding chapels.²¹ It operates these activities in close proximity to the exempt cemetery grounds, thus making the cemetery the center of an elaborate commercial operation.²² Moreover, non-profit cemetery corporations are excepted from the usual taxes on the unrelated business income of exempt organizations.²³

Another advantage can accrue to the cemetery operators if the non-profit cemetery corporation rents its buildings to a profit-making corporation. The tenant corporation might act as salesman for the non-profit cemetery, or may offer cemetery-related services. The profit-making corporation pays a high rent, which is deductible to the tenant as a business expense and is tax exempt income to the non-profit corporation. The cemetery corporation can then invest the rent proceeds in improvement of the premises, thus aiding the tenant corporation in its sales efforts. In effect, the profit-making corporation expends funds for capital resources, yet deducts the expenditure as a business expense.

Three cases have held that cemetery corporations are tax exempt although private persons profited from their operation.²⁴ In one case,²⁵ the Board of Tax Appeals held that Forest Lawn was entitled to an exemption, since it was not operated for a profit, although it was operating at a profit. This reasoning was impliedly rejected in *Knowllwood Memorial Gardens*,²⁶ where the Tax Court, quoting from Senate debates, stated that Congress did not intend to approve indirect inurement to profit-making corporations. The court did not, however, overrule the three earlier cases, but distinguished them on the peculiarities of Minnesota state law and on the facts.²⁷

Thus the law continues to favor cemeteries with tax exemptions. Yet

²¹ Forest Lawn Memorial Park in Glendale, California, originated the concept of having a mortuary on cemetery premises. A. ST. JOHNS, *FIRST STEP UP TOWARD HEAVEN: HUBERT EATON AND FOREST LAWN* 198-223 (1959). Flower and gift shops are now commonly found in cemeteries, and funeral chapels on the cemetery grounds are rented as wedding chapels. It has been suggested that admission might be charged of visitors to the cemetery. H. EATON, *THE COMEMORAL* 49 (1954). Sale of burial vaults and grave markers has been attacked by members of the respective industries as a restraint of trade.

²² Lanning, *supra* note 18, at 638.

²³ INT. REV. CODE of 1954, § 511. This advantage is shared by only a few types of organizations, principally those formed for the mutual benefit of their members, not for the production or sale of anything to third parties.

²⁴ *Commissioner v. Kensico Cemetery Co.*, 35 B.T.A. 498 (1937), *aff'd*, 95 F.2d 594 (2d Cir. 1938); *Forest Lawn Memorial Park Ass'n*, 5 CCH TAX CT. MEM. 738 (1946); *Forest Lawn Memorial Park Ass'n*, 45 B.T.A. 1091 (1941).

²⁵ *Forest Lawn Memorial Park Ass'n*, 45 B.T.A. 1091 (1941).

²⁶ 46 T.C. 764 (1966).

²⁷ *Id.* at 780.

the cemetery business has changed so significantly that the original justifications for this special treatment seem invalid. Indeed, the current income tax exemptions encourage profit-oriented promoters to increase the commercial aspects of cemetery services.

B. Property Tax Exemption

Most states exempt cemeteries from property taxation.²⁸ In addition, courts have held that property owned by a cemetery and rented for another use is exempt from taxation.²⁹ The exemptions thus encourage speculation, as land not used for interment can be held tax-free and may later be profitably sold for other uses.

Property tax exemptions for churches,³⁰ hospitals,³¹ colleges,³² and charities³³ are often justified on the ground that these institutions relieve a public economic burden.³⁴ Freedom from taxation is designed to encourage and compensate individuals and organizations who pursue valuable but economically unattractive endeavors. If exemptions aid public education, relieve poverty, maintain public health, extend welfare benefits, encourage morality and discourage anti-social conduct, they may be economically justifiable.³⁵

Yet, do cemeteries serve any of these or comparable functions that would justify an exemption? Do they relieve government of the burden of providing an economically unattractive service? It is probable that any theoretic-

²⁸ *E.g.*, CAL. CONST. art. XIII, § 1(b). Exemption from the property tax does not include exemption from special assessments for local improvements unless it is specifically shown to be intended. 26 YALE L.J. 161 (1916). CAL. HEALTH & SAFETY CODE § 8561 (West 1955) exempts cemetery property from public improvement assessments.

²⁹ A non-profit cemetery which rents land to a tenant farmer retains its property tax exemption if rent receipts are earmarked for cemetery purposes. *Locust Grove Cemetery Ass'n v. Rose*, 16 Ill. 2d 132, 156 N.E.2d 577 (1959). This gives cemeteries a broader exemption than that given other charities. A non-profit home for the aged lost its exemption when it rented some property to a tenant farmer since that was not a charitable purpose. *People v. Jessamine Withers Home*, 312 Ill. 136, 143 N.E. 414 (1924).

³⁰ *E.g.*, CAL. CONST. art. XIII, § 1½ (including church parking lots).

³¹ *E.g.*, CAL. CONST. art. XIII, § 1(c).

³² *E.g.*, CAL. CONST. art. XIII, § 1(a). Private colleges are exempt but not private schools at lower levels.

³³ *E.g.*, CAL. CONST. art. XIII, § 1(c).

³⁴ Property tax exemptions are often used without regard for their effects. On the local tax base, they provide indirect subsidies of private causes which would often have been impossible as direct subsidies. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 87 (1963).

³⁵ Institutional tax exemptions in general have been criticized for going beyond this function because the impact of the exemption is unequal and not in relation to the benefits received by the community. Legislative bodies use less discrimination than they would if the gift appeared in the budget, and exemptions impose forced contributions on taxpayers without their consent. ADVISORY COMM'N, *supra* note 34, at 84-85.

cal governmental responsibility to operate cemeteries would be assumed by private parties even in the absence of tax exemption. Unlike charities, which depend on donations, cemeteries can increase their collections to cover added costs; thus there is no need for a subsidy. The interest of private enterprise in providing these services is evidenced by the growth of private cemeteries. For example, in the last twenty-five years the ratio of public to private cemeteries has decreased by almost fifty percent.³⁶ Although persons now in the cemetery business might never have entered the field had it not been for special tax treatment, the industry is now well established and profitable. It is unlikely that higher prices would result in a significant loss of business, due to the lack of sales resistance and bargaining power of the bereaved. Increasing prices to reflect more accurately full costs would not cripple the industry.

Property tax exemptions might also be justified if the exempt property is put to uses from which all members of the community may benefit more or less equally.³⁷ However, cemeteries do not seem to provide "equal benefit"—equal at least in the aggregate. Some people do not use cemeteries at all, preferring cremation. Some people prefer less elaborate burials than do others. The benefits available from the exemption vary not only according to the person's taste, but also according to his means, since even if owners pass on the saving, it will be shared in proportion to the person's expenditures. Equal opportunity to enjoy the benefit does not justify the exemption.

Exemptions are sometimes justified on the grounds that they promote non-economic values. For instance, in order to express gratitude for military service, society grants veterans and their widows property tax exemptions.³⁸ Tax exemptions for cemeteries may aid the non-economic function of assuaging the survivors' grief. The placid, park-like atmosphere of the memorial park subsidized by tax exemptions arguably satisfies the survivor's psychological needs;³⁹ the success of modern cemeteries is due in part to their ability to fulfill these needs.⁴⁰ On the other hand, the main-

³⁶ J. MITFORD, *THE AMERICAN WAY OF DEATH* 145 (1963).

³⁷ *But cf.* Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955), which indicates that private profits are acceptable if the dominating purpose is not resale to private interests to which some of the tax advantages would be extended.

³⁸ *E.g.*, CAL. CONST. art. XIII, § 1¼.

³⁹ See Lindemann, *Symptomatology and Management of Acute Grief*, 101 AM. J. PSYCHIATRY 141, 142 (1944); FREUD, *Mourning*, in 4 COLLECTED PAPERS 152, 288 (1925); L. BOWMAN, *THE AMERICAN FUNERAL: A STUDY IN GUILT, EXTRAVAGANCE AND SUBLIMITY* 15 (1959).

⁴⁰ See H. EATON, *supra* note 21, at 11. The author writes of the "Memorial Impulse," man's desire to be remembered when he's gone, which, in his opinion, is the "driving force behind cemeteries." Eaton says in his chapter, "Civilization's Debt," that, "except for Christianity itself, nothing has been more forceful or beneficial in its influence than the "Memorial Impulse." *Id.* at 19. This would not seem to be an appropriate reason for tax exemption.

tenance of expensive, government-assisted burial practices is not essential to satisfy ethical or religious requirements.⁴¹ Judaism dictates simplicity in funerals and the orthodox law prohibits embalming. Catholicism finds efforts to "dream away the idea of death," as practiced by the operators of some memorial parks repugnant to its canon law.⁴² Protestant clergy also deplore the distortion of what they regard as an important and solemn religious rite.⁴³ The satisfaction of a psychological need to relieve grief and purge guilt feelings would seem to be an insufficient basis for tax exemption, in view of the harmful effects on land-use and the local tax base.

Some courts have upheld cemetery tax exemptions to avoid the threat of a tax sale and the consequent dishonor to the dead.⁴⁴ Fears of a tax sale are not well-grounded where cemeteries have perpetual endowment care funds. Often the law provides that such funds must be maintained.⁴⁵ Even in the absence of such a fund, as where it has been embezzled, a tax sale can be delayed to give the relatives of those interred therein a chance to redeem.

If government assistance to cemeteries is justifiable, it must be shown that the social, religious, and psychological gains outweigh the economic costs borne by society. The most accurate way to measure the non-economic benefits is to place all the economic costs in the price of the services; the demand for services at that price will measure the non-economic factors precisely.⁴⁶ Thus, if some people buy cemetery lots at \$100 but not at \$125, it is because they do not receive \$125 worth of gratification from the expenditure and they would rather spend the money on some other product.

C. Power to Impose Restrictions

A cemetery "lot owner" holds an interest similar to an easement or license giving him the right of burial; title to the fee, however, remains in the

⁴¹ It has been suggested that social practices involved with disposing of the dead are on a par with fashions of dress and etiquette and are no more than luxuries. Kroeber, *Disposal of the Dead*, 29 AM. ANTHROPOLOGIST 3 (1927).

⁴² McCaslin, *Recent Synodal and Extra-Synodal Legislation Concerning Christian Burial*, 19 JURIST 91 (1959); Kerin, *Christian Burial Problems*, 15 JURIST 252 (1955).

⁴³ Fulton, *The Clergyman and the Funeral Director: A Study in Role Conflict*, 39 SOCIAL FORCES 317, 322 (1959).

⁴⁴ "What would be the security of those who would venerate the dead, if the tax-gatherer might enter such sacred precincts and sell at public outcry the land adjoining their tombs to some publican who might build thereon a bar room or brothel." *Metairie Cemetery Ass'n v. Board of Assessors*, 37 La. Ann. 32, 35 (1885).

⁴⁵ E.g., CAL. HEALTH & SAFETY CODE § 8738 (West 1955).

⁴⁶ At least one author has concluded that the non-economic benefits received from elaborate burial grounds do not legitimate the economic outlay they necessitate. L. BOWMAN, *supra* note 39, at 121.

grantor.⁴⁷ The lot owner has, in addition, an easement of way over the cemetery roads for the purpose of obtaining access to his lot.⁴⁸ Interests in cemetery lots may be devised and inherited.⁴⁹

Because the lot owner's interest is an interest in real property, certain legal principles should apply to dealings with it. Since the grantor retains the fee, he may make reasonable and uniform restrictions on the type, placement and installation of grave markers, the maintenance and decoration of graves, and the use of tents and vaults.⁵⁰ Specific regulations are often authorized by statute.⁵¹

It is understandable that cemetery owners are granted some restrictive powers in order to protect their continuing interests, yet some of the permitted restrictions are difficult to justify. For example, racial restrictive covenants are unenforceable under the Federal Constitution,⁵² but courts

⁴⁷ *City of Meriden v. West Meriden Cemetery Ass'n*, 83 Conn. 204, 76 A. 515 (1910); *Oakridge Cemetery Ass'n v. Oakridge Cemetery Corp.*, 14 Ill. App. 378, 144 N.E.2d 853 (1957); *Huse v. Snodgrass*, 330 Mich. 465, 47 N.W.2d 696 (1951); *Billings v. Paine*, 319 S.W.2d 653 (Mo. 1959); *Hutchison Land Co. v. Whitehead Bros.*, 218 App. Div. 682, 219 N.Y.S. 413 (1926).

⁴⁸ *Brunton v. Roberts*, 265 Ky. 569, 97 S.W.2d 413 (1936); *Kesselman v. Goldstein*, 148 Neb. 452, 27 N.W.2d 692 (1947); *City View Cemetery Ass'n v. Salem Mausoleum & Crematorium, Inc.*, 209 Ore. 199, 305 P.2d 379 (1956); *Dunbar v. Oconomowac Cemetery Ass'n*, 189 Wis. 164, 207 N.W. 265 (1926). See also 74 U. PA. L. REV. 850 (1926).

⁴⁹ CAL. HEALTH & SAFETY CODE § 8603 (West 1955); 30 CONN. B.J. 332 (1956).

⁵⁰ *Lawson v. Woodmere, Inc.*, 217 F.2d 148 (4th Cir. 1954); *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E.2d 893 (1955); *Ignatowski v. St. Mary's Polish Catholic Cemetery Co.*, 174 Pa. Super. 52, 98 A.2d 234 (1953); Note, *Cemeteries—Effect of Regulations Prohibiting All Shrubbery and Limiting Headstones to Ground Level*, 14 GA. B.J. 230 (1952). See generally *Eisner, Rules and Regulations of the Cemetery Corporation and the Nature of the Plot Holder's Property Right*, 6 N.Y.U. INTRA. L. REV. 117 (1951). Since cemeteries may regulate the size, material, design, and installation of such markers, the regulation could potentially enable the cemetery to secure a monopoly in the sale and distribution of such products. The Courts have generally held against the cemetery where such a tendency exists. See, e.g., *Roselawn Memorial Park v. DeWall*, 11 Ill. App. 2d 66, 136 N.E.2d 702 (1956); *People ex rel. Charles G. Blake Co. v. Oak Woods Cemetery Ass'n*, 17 Ill. 2d 64, 160 N.E.2d 759 (1959). See also Note, *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378 (1961); H. BERNARD, *THE LAW OF DEATH AND DISPOSAL OF THE DEAD* 84-85 (1966).

⁵¹ E.g., CAL. HEALTH & SAFETY CODE § 8300 (West 1955) (general power to make and modify rules), § 8301 (restrict and limit use of the cemetery), § 8302 (types of markers), § 8306 (prevent interment of remains not entitled to interment), § 8307 (regulate conduct of persons in the cemetery), § 8308 (make rules deemed necessary to carry out purposes), § 8325 (grants authority to peace officer to enforce city, county, and cemetery rules on the premises), §§ 8713-15 (eminent domain over walks, roads, etc.). These powers are similar to the exception to the rule against restraints on alienation for leaseholds and life estates which is based on the theory that the reversioner has substantial interest in protecting the property. See RESTATEMENT OF PROPERTY § 403 (1944); CAL. CIV. CODE § 711 (West 1954).

⁵² Enforcement would be a denial of equal protection contrary to U.S. Const. amend. XIV; *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

allow racial restrictions on the assignment of a cemetery lot.⁵³ State statutes voiding such racial restrictions on cemetery lot transfers have been enacted in recent years.⁵⁴ While these statutes are an effective control of the cemetery's regulatory power in this area, it is difficult to understand why the rule of *Shelley v. Kraemer*⁵⁵ does not apply in the absence of a statute.⁵⁶ Racial restraints are now considered unreasonable in a constitutional, and perhaps common law sense.⁵⁷

Religious restrictions involve slightly different problems. Burial is an important rite in many faiths and thus statutes prohibiting discriminatory covenants as to religion do not apply to cemeteries that restrict burial to members of a certain faith.⁵⁸ This exception appears reasonable where a cemetery associated with a particular religion inters only members of that faith, or where a commercial cemetery devotes a parcel to the use of one religion. The restriction is unreasonable, however, where in order to cater to customer prejudices, a publicly owned or commercial cemetery excludes members of certain faiths.

III. CEMETERIES AND LAND USE PROBLEMS

Failure to require cemeteries to bear their full costs promotes uneconomic uses of land. Special privileges and tax exemptions make it cheaper for cemeteries to own land than it is for owners who do not receive the exemptions and must pay full costs. Thus, not only is the lost tax revenue shifted to other taxpayers, but an excessive amount of land may be used

⁵³ *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880 (1954), *aff'g*, 245 Iowa 147, 60 N.W.2d 110 (1953); *Long v. Mountain View Cemetery Ass'n*, 130 Cal. App. 2d 328, 278 P.2d 945 (1955); *Forest Lawn Memorial Park Ass'n v. DeJarnette*, 79 Cal. App. 601, 250 P. 581 (1926); *People ex. rel. Gaskill v. Forest Home Cemetery Co.*, 258 Ill. 36, 101 N.E. 219 (1913), *appeal dismissed*, 238 U.S. 606 (1915).

⁵⁴ CAL. CIV. CODE § 53(a)(b) (West 1954); IOWA CODE ANN. § 566 A.8 (Supp. 1966); N.J. STAT. ANN. § 10:1-9 (1960); N.Y. MEMBERSHIP CORP. LAW §§ 84(2), 88 (McKinney 1951); S.D. CODE § 11.19A08 (Supp. 1960).

⁵⁵ 334 U.S. 1, 20 (1948): "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."

⁵⁶ Racial restraints on use and occupancy of real property are generally unenforceable. *Cummings v. Hokr*, 31 Cal. 2d 844, 193 P.2d 742 (1948); *In re Laws*, 31 Cal. 2d 846, 193 P.2d 744 (1948); *Coleman v. Stewart*, 33 Cal. 2d 703, 204 P.2d 7 (1949); see Comment, *Restrictive Covenants and Equal Protection—The New Rule of Shelley's Case*, 21 S. CAL. L. REV. 358, 374 (1948).

⁵⁷ See RESTATEMENT OF PROPERTY § 406, comments *i-p* (1944), which state the traditional common law rule on reasonableness of restraints on alienation of a fee simple interest. Racial restraints (comment *I*) are enforceable. *But see* comment *n* on "Change in circumstances."

⁵⁸ *E.g.*, *Spencer v. Flint Memorial Park Ass'n*, 4 Mich. App. 157, 144 N.W.2d 622 (1966); *Erickson v. Sunset Memorial Park Ass'n*, 259 Minn. 532, 108 N.W.2d 434 (1961).

for cemetery purposes.⁵⁹ If cemeteries paid taxes, land now held for future burial use would be put to a more economic use.⁶⁰ If cemetery space were reduced, cemetery proprietors might use more efficient techniques, such as the mausoleum.⁶¹ Advance sales of graves, which tend to tie up land unnecessarily, might become less widespread.⁶² Cemeteries do provide open spaces in urban areas, but, despite the beauty of the modern memorial park, people still dislike living next to a graveyard. The solution to land use problems, such as providing adequate open space, should be left to zoning techniques.⁶³

When a cemetery is inactive and the land can be put to a use which makes it profitable to relocate the interred bodies, it is hard to understand why the land should not be put to that other use. Accordingly, laws in some states provide that if there have been no burials for several years and the graveyard is in disrepair, the court may, on the land owner's application, order removal of the interred bodies.⁶⁴ If, however, relatives are known, their consent may be required.⁶⁵ In the absence of consent, held the *Beekman Street Case*,⁶⁶ a deceased person's next of kin must be indemnified for the expense of moving and reburial of the body made necessary by the taking of the plot.

Since *Beekman Street*, protection of cemeteries from condemnation has also significantly increased. A state statute may exempt cemetery property from condemnation entirely or allow takings only with the consent of the cemetery authority or the lot owners.⁶⁷ If cemeteries are to have immunity

⁵⁹ Testimony at zoning hearings in Los Angeles demonstrate this effect; there are sufficient graves to satisfy the area's needs for the next century. J. MITFORD, *supra* note 4, at 147.

⁶⁰ Of course, as long as cemeteries may rent unused land, the force of this criticism is diminished. See *supra*, note 25 and accompanying text.

⁶¹ About 2000 bodies an acre can be buried, while it is realistically estimated that a mausoleum can accommodate 10,000 an acre. J. MITFORD, *supra* note 4, at 127-29.

⁶² In 1960 over one-half of the 1.7 million persons who died had bought graves in advance. Total grave sales for that year were in excess of 3 million. *Id.* at 132. If we assumed that the average pre-need customer purchased five years before death and that 2 million graves were sold annually to such customers, there would be at all times 10 million sold, but unused, graves.

⁶³ Tax exemptions may, of course, be used to achieve desired land use ends, such as open space. But exemptions are a clumsy tool to use for such purposes; for the amount of the subsidy cannot be determined in advance, the costs are imposed upon property owners inconsistently, and the fact that a land use decision is being made is disguised, perhaps even from the legislators.

⁶⁴ First Evangelical Lutheran Church Petition, 13 Pa. D. & C.2d 93 (Westmoreland County Ct. 1957); Fairlawns Cemetery Ass'n v. Zoning Comm'n, 138 Conn. 434, 86 A.2d 74 (1952); Touro Synagogue v. Goodwill Industries, 233 La. 26, 96 So. 2d 29 (1957). CAL. HEALTH & SAFETY CODE § 7526 (West 1955).

⁶⁵ E.g., CAL. HEALTH & SAFETY CODE § 7525 (West 1955).

⁶⁶ *In re Widening of Beekman Street*, 4 Bradf. Sur. 503 (N.Y. 1856).

⁶⁷ CAL. HEALTH & SAFETY CODE § 8560 (West 1955).

from condemnation, the location of new cemeteries should be closely controlled. Planning must determine that the location is one which will not foreseeably necessitate a condemnation for public use.

IV. PROPOSAL FOR REFORM: PREFERENTIAL TREATMENT OF CEMETERIES SHOULD CEASE

In the absence of any significant policy reasons to the contrary, cemeteries should be treated the same as any other producer of goods and services. The justifications for property and income tax exemptions are not properly applied to cemeteries. The income tax exemption allows a bonus for the promoter in the form of the "bootstrap transaction"; the property tax exemption spreads its costs over the entire community and creates a scarcity of potentially productive land. If the economy is to achieve the most beneficial mix of goods and services, prices should reflect the full costs imposed on society. Diseconomies which adversely affect some elements of the economy occur when the true costs of another economic product are not borne by the users of that product.

Eliminating tax exemptions may cause burial prices to rise. However, the increased accuracy of burial prices will enable people to make better economic judgments. In addition, costs will not be placed on those who gain no benefit from the activity. Higher prices will not result if proprietors accept lower profits in the belief that higher prices would encourage less expensive alternatives.⁶⁸

If prices are increased some people will probably pay the higher price; others will seek less costly alternatives, such as cremation or donation of the body to science. Either alternative provides favorable results in terms of land use. A third alternative is the formation of burial associations—cooperatives which provide plain and dignified burial services at a minimum cost.⁶⁹

Increased prices might prevent the burial of persons whose convictions, religious or otherwise, preclude less costly alternatives. To provide for such cases, the present subsidy might be replaced by public assistance to needy individuals. Social security,⁷⁰ veterans' benefits,⁷¹ and union pension funds⁷²

⁶⁸ High prices might be due to collusive practices that mar the competitive market. See *Hearings on Antitrust Aspect of the Funeral Industry Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess., pt. 1, at 1 (1964).

⁶⁹ Such organizations have become popular in the last few years and are operating successfully in many places throughout the country with several thousand members. See, e.g., *Memorial Societies: A Plan For Simple Inexpensive Funerals*, GOOD HOUSEKEEPING, Aug. 4, 1962, at 133.

⁷⁰ Social Security Amendments of 1960 § 203(a), 74 Stat. 947, 42 U.S.C. § 402(l) (1964).

⁷¹ Veterans' Benefits Act of 1957 § 802, 38 U.S.C. § 902 (1964).

⁷² Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L.J. 827 (1958); 1958 INS. L.J. 801.

already include provisions for modest payments for burial expense. Similar provisions could be made for those not eligible under existing programs.

In general, cemeteries should be placed squarely within the free market they often espouse.⁷³ There, they would be forced to charge rates fully reflecting their costs; and they would be compelled to prove to consumers that their value equals those costs.

⁷³ Writers and leaders in the cemetery industry identify their business with the free enterprise system. For example, they exhibit patriotic statuary and relics and oppose government interference with free enterprise. For example, in Forest Lawn's "Court of Liberty," a crypt scene depicts Laocoon's mythological struggle with a serpent labeled "Liberalism, Socialism, Taxes, Bureaucracy."