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Valparaiso University

MOVING CEMETERIES TO BUILD LOW INCOME HOUSING—A VIOLATION OF THE "RIGHT TO REST IN PEACE?"

INTRODUCTION

In the United States today there are approximately one-half million acres of land being used for cemeteries.[1] Much of this land would be more valuable if it were used for urban growth. Cemeteries that were founded near cities have now been engulfed by the growth of the community.[2] Some of our cities have no opportunity for growth. Not only is New York hemmed in by surrounding communities, but with Manhattan located on an island, it has no room for expansion. In the midst of these cities, vast acreages that are being used for cemeteries can be found. Due to the increase in population and the need for low income housing, the feasibility of moving some cemeteries and once again making this land productive to the living is being examined.

The purpose of this note is to discuss some of the problems involved in using the power of eminent domain to move cemeteries in order to make the land available for the construction of low income housing. The constitutional issues involved in this project will also be discussed. Some of the foreseeable problems are: 1) the land to be taken by eminent domain is already being used for a "public use"; 2) religious problems would arise if the cemetery is affiliated with a religious organization;[3] 3) consideration must be given to the supposed wishes of the deceased and his next of kin; and 4) it must be determined whether the dead have constitutional rights, and, if so, who has standing to raise those rights.

EMINENT DOMAIN

The power of eminent domain would have to be exercised by the state in order to acquire cemetery land. Before the power of eminent domain can be exercised, the reason for the taking must be shown to be

1. Exact statistics are unavailable, due to the fact that the United States Bureau of Census groups the statistics for cemeteries with statistics for other land uses. The American Association of Cemeteries and the National Association of Cemeteries cannot provide exact statistics. However, the National Association of Cemeteries has statistics from a "rough survey" taken in 1963, and at that time there were 590,000 acres of land being used for cemetery purposes.

2. City of New Orleans v. Christ Church Corp., 228 La. 184, 81 So. 2d 855 (1955); *In re* Board of St. Openings & Improvements, 133 N.Y. 329, 31 N.E. 102 (1892).

3. *See generally* Lane, *The Position of Religion in Cases Concerning Burials and Disinterments*, 3 ST. LOUIS U.L.J. 260 (1955).

a public purpose or public use.[4] One purpose of taking cemetery land would be to build low income housing. It is well established that the taking of land to build low income housing is a public use.[5] The fact that the housing would be for a certain group of people would seem not to make it any less of a public use. In *Nashville Housing Authority v. City of Nashville*,[6] the Housing Authority wanted to appropriate land to build low income housing. The Housing Authority requested a declaratory judgment in order to affirm the validity and constitutionality of Tennessee's "Slum Clearance Act."[7] While it is submitted that moving cemeteries to build low income housing would not benefit only certain individuals, the Supreme Court of Tennessee stated: "An enterprise does not lose the character of a public use because of the fact that its services may be limited by circumstances to a comparatively small part of the public."[8]

The taking of cemetery land to build low income housing would present an added problem since the land is already being employed for a public use. Therefore, the government would be taking land from one public use and putting it to another. In *Woodland School District v. Woodland Cemetery Association*,[9] the school district sought to have a cemetery moved so that the land could be used for school purposes. The court believed that the issue to be resolved was whether a school use was *more necessary* than a cemetery use. The cemetery was moved and the school built. The question that must be answered here is whether low income housing is more necessary to the public than cemeteries. Many factors would enter into this decision; for instance, as cemetery land it is not only unproductive to the plot owners, but causes loss of revenue to local governments due to property tax exemptions which are given to cemeteries.[10] If the land were made available for low income housing, it would be productive to the public once again, and if any excess land were

4. *E.g.*, Westcott v. State Highway Comm'n, 262 N.C. 522, 527, 138 S.E.2d 133, 136 (1964). "The phrase 'eminent domain' by definition admits condemnor did not own, but took or appropriated the property of another for a public purpose." *Id.* at 527, 138 S.E.2d at 136.

5. Housing Authority v. Dockweiler, 14 Cal. 2d 437, 94 P.2d 794 (1939); People v. City of Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953); Housing and Redevelopment Authority v. Greenman, 255 Minn. 396, 96 N.W.2d 673 (1959); Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S.W.2d 946 (1951).

6. 192 Tenn. 103, 237 S.W.2d 946 (1951).

7. WILLIAMS TENN. CODE ANN. 3647.11 (1935), *replaced by* TENN. CODE ANN. § 13-807 (1956).

8. 192 Tenn. 103, 109, 237 S.W.2d 946, 950 (1951).

9. 174 Cal. App. 2d 243, 344 P.2d 326 (1959).

10. *See generally* Note, *Special Treatment of Cemeteries*, 40 S. CAL. L. REV. 716 (1967).

sold to private segments, it could be taxed and would serve as a basis for revenue.[11] Therefore, by condemning a cemetery to build low income housing, not only are the people who will live in the housing benefited, but the community as a whole will gain by putting the land *back into a productive state.*

Woodland School District dealt with the "more necessary public use" doctrine, and while the court admitted that the burial of the dead is necessary, it was not shown to be a "more truly public use than the intellectual development of our citizens."[12] If school purposes are a "more truly public use" for land than the burial of the dead, it is submitted that low income housing is also a more necessary public use than cemeteries. If we are to aid in the development of our society, we must furnish citizens not only with proper schools, but with a decent place to live.

It is well established that the courts will rely on the judgment of the legislatures and will not overrule them without good cause. *Housing and Redevelopment Authority v. Greenman*[13] dealt with the appropriation of a slum area and the subsequent sale of the land to a redevelopment authority. The question of public use was raised and the Minnesota Supreme Court stated:

> It is within the province of the legislature to declare a public use or purpose, subject to review by the courts, and such determination by a legislative body will not be overruled by the court except in instances where that determination is manifestly arbitrary and unreasonable.[14]

Therefore, if the legislature decided that cemetery land should be taken for the construction of low income housing, their decision that this is a public use would not be overruled unless it was unreasonable. The *Greenman* court felt that the term "public use" must be flexible and change as civilization advances. The definition of "public use" may be changing due to the tendency of people to crowd into large cities, and as a result, the old concepts of what was a "public use" must be changed.

There would be constitutional issues involved in the use of the

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11. There is a limit to the amount of parks, playgrounds, or public purposes which any community may afford. Where a municipality has no further need of property in a redevelopment area, there should be no reason why it should not be sold, restored to productive use, and become tax-producing property. Housing and Redevelopment Authority v. Greenman, 255 Minn. 396, 404, 96 N.W.2d 673, 681 (1959).
12. 174 Cal. App. 2d 243, 246, 344 P.2d 326, 327 (1959).
13. 255 Minn. 396, 96 N.W.2d 673 (1959).
14. *Id.* at 402, 96 N.W.2d at 679.

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power of eminent domain to move cemeteries. The first would be whether such taking violates "due process."[15] The taking of land by the power of eminent domain requires payment of just compensation[16] and that the taking be for a public use.[17] In *Housing and Redevelopment Authority v. Greenman,*[18] the court held that use of the power of eminent domain and condemnation proceedings are "legislative rights of government." The court went on to say that "[t]he only questions which are judicial are the public use and adequacy of compensation."[19] The condemnee can waive his right to compensation by granting the land to the sovereign.[20] This would not be a taking and would therefore require no compensation.

Disinterment Generally

In certain cases, the religious implications of disinterment have been given such consideration. For instance, in Jewish custom, once a burial has taken place in consecrated ground, disinterment will be allowed only under three circumstances: 1) the burial was temporary, 2) the grave is not safe or 3) the deceased is to be reinterred in Palestine.[21] A New York case involving disinterment from a Jewish cemetery allowed it only after petitioners had submitted written permission from an eminent rabbi.[22] However, in a subsequent New York case,[23] the court refused to follow the advice given by an eminent rabbi and allowed disinterment so that the decedent could be buried next to his wife. The court felt that "the laws and usages of the religious body must at times be subordinated to the feelings of the survivors."[24] The seeming incongruity between these two New York cases can be explained by examining the issues that each court believed important.

Courts seem to be in agreement that the basic questions to be given

15. U.S. CONST. amend. XIV.
16. U.S. CONST. amend. V.
17. Housing and Redevelopment Authority v. Greenman, 255 Minn. 396, 96 N.W.2d 673 (1959).
18. *Id.*
19. *Id.* at 402, 96 N.W.2d at 679.
20. The answer admitted the construction of the highway over petitioner's Casino property. It denied petitioner was entitled to compensation because he had by writing . . . granted respondent the right to construct and maintain the road.
Westcott v. State Highway Comm'n, 262 N.C. 522, 525, 138 S.E.2d 133, 135 (1964).
21. *See generally* S. GANZFRIED, CODE OF JEWISH LAW 105 (1928).
22. Raisler v. Krakauer Simon Schreiber Congregation, 47 N.Y.S.2d 938 (1944).
23. Application of Sherman, 107 N.Y.S.2d 905 (1951), *aff'd* 279 App. Div. 872, 110 N.Y.S.2d 224 (1952), *motion for leave to reargue and appeal denied,* 279 App. Div. 919, 110 N.Y.S.2d 919, *aff'd* 304 N.Y. 745, 108 N.E.2d 613 (1952).
24. 107 N.Y.S.2d 905, 906 (1951).

consideration when disinterment is contemplated are: 1) the interest of the public, 2) wishes of the decedent, 3) the rights and feelings of spouse or next of kin, 4) religious considerations and 5) whether the party requesting disinterment had initially consented to the burial. While there may be agreement as to the basic questions, the order of their importance is not always the same. In *Pettigrew v. Pettigrew,*[25] the wife of the deceased wanted to move her husband's body from his father's family plot to a plot purchased by her so they could be buried together. The deceased's brother opposed disinterment, but the court ruled that the wishes of the surviving spouse are paramount to those of the next of kin. The *Pettigrew* court, in listing its considerations, placed the wishes of the surviving spouse before the wishes of the deceased.[26] Thus, by assigning weights to the particular interest, the court can make whatever decision it wishes. On similar facts, another court reached exactly the opposite result and refused to allow disinterment.[27] The wife died a Roman Catholic and was buried in a noncatholic cemetery which had had its ground consecrated according to the rites of the Catholic Church. When the husband wanted to have his wife's body moved to a plot where he too could be buried, the court refused. It was decided that the wife would prefer to remain in consecrated ground rather than to be moved so that her husband could be buried beside her. Here the "wishes" of the deceased were considered controlling.

There is an obvious feeling among some courts that disinterment is not desirable. The *Pettigrew* court displayed its aversion to disinterment by quoting "the imprecation on the tomb at Stratford, 'Curst be he that moves my bones.' "[28] In a more recent New Mexico case,[29] a wife wanted to move her husband's body to a place of her choosing. The court decided that the wife would not be allowed to disinter her husband's body because she had "consented and never objected to burial of his body in the lot mentioned."[30] The court then disclosed to what length it would go to prevent disinterment.

> The fact that the accident of death struck not once but twice if, indeed, not thrice in quick succession the ranks of those disturbing the tomb of Tut-Ankh-Amen could afford only proof certain to the superstitious that an evil fate awaited

25. 207 Pa. 313, 56 A. 878 (1904).
26. *Id.* at 319, 56 A. at 881.
27. *In re* Donn, 14 N.Y.S. 189 (1891).
28. 207 Pa. 313, 318, 56 A. 878, 880 (1904).
29. Theodore v. Theodore, 57 N.M. 434, 259 P.2d 795 (1953).
30. *Id.* at 436, 259 P.2d at 796.

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> those who dared disturb the sleep of the dead. While not sharing their tortured ideas, yet strongly bound by judicial precedent as we are, we decline to enter an order which would unseal the tomb of this sleeping body. Let it sleep on wholly oblivious to the turmoil that rages above it. *Requiescat in Pace!* Let the tomb remain sealed and the judgment which so directed it stand affirmed.[31]

Other courts have expressed similar views. In *Currier v. Woodlawn Cemetery,*[32] the court stated: "The quiet of the grave, the repose of dead, are not lightly to be disturbed."[33] In an opinion written by Justice Cardozo while he was serving on the New York Court of Appeals,[34] he stated: "The dead are to rest where they have been lain unless reason of substance is brought forward for disturbing their repose."[35] Before it will be possible to move entire cemeteries for the purpose of building low income housing, this emotional feeling against disinterment must be overcome. It would have to be made apparent to the public that these cemeteries would not be desecrated and the bodies discarded, but that there are more efficient methods of preserving these bodies.[36] Large mausoleums could be built which might alleviate some of the emotional problems that would arise.

Disinterment by Eminent Domain

One of the leading and much cited cases on the subject of disinterment is *In re Widening of Beekman Street.*[37] After giving the background to disinterment,[38] the court summed up requirements for disinterment which are essentially followed today. The court ruled:

> That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect. That such right, in the absence of any testamentary

31. *Id.* at 439, 259 P.2d at 798.
32. 300 N.Y. 162, 90 N.E.2d 18 (1949).
33. *Id.* at 164, 90 N.E.2d at 19.
34. Yome v. Gorman, 242 N.Y. 395, 152 N.E. 126 (1926).
35. *Id.* at 403, 152 N.E. at 129.
36. About 2000 bodies an acre can be buried, while it is realistically estimated that a mausoleum can accomodate 10,000 an acre. J. MITFORD, THE AMERICAN WAY OF DEATH 127-29 (1963).
37. 4 Bradf. Sur. 503 (N.Y. 1856).
38. In England and at common law, the problem of disinterment was handled by the ecclesiastical courts. Due to the separation of church and state in America, there was no ecclesiastical court and the cases were generally decided by courts of equity. "[N]either a corpse, nor its burial, is legally subject to ecclesiastical cognizance, nor to sacerdotal power of any kind." *Id.* at 532.

disposition, belongs exclusively to the next of kin.

That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

That if the place of burial be taken for a public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring their remains.[39]

With the construction boom that followed the industrial revolution in the United States, it was inevitable that cases would arise from the taking of cemetery land by eminent domain. The street widening was sanctioned in *Beekman* and the next of kin of the decedents were compensated for removal and reinterment elsewhere. In a subsequent New York case,[40] the court of appeals decided that if land being used as a cemetery were needed for other purposes, the power of eminent domain could be used.[41]

In Pennsylvania, an attempt was made by the legislature to exempt cemeteries from the power of eminent domain. The legislature, in 1849, passed the following act:

It shall not be lawful to open any street, lane, alley or public road through any burial ground or cemetery within this commonwealth, any laws heretofore passed to the contrary notwithstanding: Provided, that this section shall not extend to the city or county of Philadelphia.[42]

In *In re Legislative Route 1018*,[43] the Pennsylvania Supreme Court would not allow the highway department to appropriate cemetery land in order to construct a highway. The state contended that it was exempt from coverage of the Act since it, as a state, was not specifically mentioned. However, the court decided that since the power of eminent domain is exclusively in the sovereign and can be delegated by it, the Act would serve no purpose if it did not apply to the Commonwealth of Pennsylvania. Pennsylvania managed to circumvent the Act, however,

39. *Id.*

40. *In re* Board of St. Openings & Improvements, 133 N.Y. 329, 31 N.E. 102 (1892).

41. The fact that lands have previously been devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain. That is an absolute power, belonging to the sovereign, which can be exercised for the public welfare whenever necessity for its exercise exists.
Id. at 333, 31 N.E. at 103.

42. PA. STAT. ANN. tit. 9, § 8 (1965).

43. 422 Pa. 594, 222 A.2d 907 (1966).

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by having the federal government condemn the cemetery land.[44]

In *United States v. Sixty Acres, More or Less, of Land,*[45] a government project had to condemn a cemetery which would be flooded as a result of the construction of a dam. The condemnees argued that the land was already devoted to a public use and it could not, therefore, be condemned for another.[46] The court rejected this argument and said that if land already put to a public use were needed for a constitutional purpose, condemnation would be allowed for "the achievement of such purposes."[47] The case was relitigated when it was found that the project needed more land.[48] In the second litigation, the condemnees contended that the appropriation of cemetery land would violate Illinois laws dealing with the protection of cemeteries.[49] The court decided that since this was not an unauthorized disinterment, it was not in violation of Illinois civil or criminal laws.

Mannheimer v. Wolff[50] emphasized the fact that there must be a valid reason for disinterment. The plaintiff asked for disinterment because the grave decorations were not uniform as promised. The court in this case was unwilling to allow disinterment as requested by the plaintiff. In the opinion of the court, disinterment would not be allowed because

> [i]t is the policy of the law except in cases of necessity or for *laudable purposes* that the sanctity of the grave should be maintained and that a body once suitably buried should remain undisturbed, and a court will not order or permit a body to be disinterred unless there is a strong showing that it is necessary and that the *interests of justice* require it.[51]

Since cemeteries have been condemned, through the power of eminent domain, for such purposes as building schools,[52] roads,[53] reservoirs[54] and other uses,[55] it would seem that the power could be used to condemn

44. United States v. 17.0098 Acres of Land, 269 F. Supp. 960 (E.D. Pa. 1967).
45. 28 F. Supp. 368 (E.D. Ill. 1939).
46. *See* notes 4-9 *supra* and accompanying text.
47. 28 F. Supp. 368, 373 (E.D. Ill. 1939).
48. United States v. 2.74 Acres of Land in Williamson County, 32 F. Supp. 55 (E.D. Ill. 1940).
49. Law of March 27, 1874, ch. 38 §§ 354, 355 (repealed 1961).
50. 38 Ill. App. 2d 216, 187 N.E.2d 1 (1962).
51. *Id.* at 225, 187 N.E.2d at 6 (emphasis added).
52. Woodland School District v. Woodland Cemetery Ass'n, 174 Cal. App. 2d 243, 344 P.2d 326 (1959).
53. *In re* Legislative Route 1018, 269 F. Supp. 960 (E.D. Pa. 1967).
54. United States v. Sixty Acres, More or Less, of Land, 28 F. Supp. 368 (E.D. Ill. 1939).
55. Pansing v. Miamisburg, 79 Ohio St. 430, 87 N.E. 1139 (1908) (public

cemeteries so that low income housing could be built. Low income housing falls within the definition of a public use,[56] since it would result in bettering society and giving the residents a better place to live. It would be a "laudable purpose" and in "the interests of justice."

CONSTITUTIONAL PROBLEMS

Free Exercise of Religion

Just as the government cannot establish a state religion, it cannot prevent someone from exercising the religion of his choice.[57] The difficulty with moving whole cemeteries to put in low income housing would be mainly with the members of the Roman Catholic and the Jewish faiths. To both of these faiths, burial is a sacred right and a very important part of their religion.

The first major case to deal with the free exercise clause of the first amendment was *Reynolds v. United States.*[58] This case dealt with a member of the Mormon Church being prosecuted for polygamy. The Supreme Court felt that making polygamy illegal may have been an interference with the defendant's free exercise of religion; but the Court determined that the good to society outweighted the possible infringement on the defendant's religious freedom. "Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach [religious] actions which were in violation of social duties or subversive of good order."[59] One possible use of this precedent would be to contend that preventing low income housing by not allowing disinterment and removal of cemeteries would be "subversive of good order." However, if Congress can make illegal anything "in violation of social duties or subversive of good order," it would seem that it should have the power to promote the same. The building of low income housing will be a promotion of "good order" by giving the people who would live there a better environment in which to live.

In a case with similar facts, *Davis v. Beason,*[60] the Court held that a practice of a religious sect could be made illegal if the decision were for the good of society.

The first amendment to the Constitution, in declaring that

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building and parks); Laureldale Cemetery Co. v. Reading Co., 303 Pa. 315, 154 A. 372 (1931) (railroads).

56. *See* note 6 *supra* and accompanying text.
57. U.S. CONST. amend. I.
58. 98 U.S. 145 (1878).
59. *Id.* at 164.
60. 133 U.S. 333 (1889).

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> Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one . . . to exhibit his sentiments in such form of worship as he may think proper, *not injurious to the equal rights of others*. . . . It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical *to the peace, good order and morals of society*.[61]

The language in the *Davis* case that the free exercise of religion will be allowed when it is *not* "injurious to the equal rights of others," seems to support the proposition that when religious freedom *is* "injurious to the equal rights of others," it will not be allowed. It would seem that if someone could prevent the government from using cemetery land to build low income housing for the poor, it would be "injurious to equal rights." Therefore, it is submitted that everyone has a right to live in a decent environment and the right to be free from high disease and crime rates. The good to society in general by allowing people to move out of the slums and into decent housing should outweigh the harm that would result from interfering with religious freedom. The *Davis* case also said that the first amendment could not prevent legislation dealing with punishment of acts that would harm the "peace, good order and morals of society." If this is true, the same thing should apply to legislation promoting the "peace, good order and morals of society."

In *Braunfeld v. Brown*,[62] the Supreme Court dealt with a "Sunday Closing" law that a Jewish merchant contended violated his free exercise of religion. The Court first decided that the "purpose" and "effect" of the law was to promote a secular goal and that it only "indirectly" restrained the plaintiff's free exercise of his religion. The test proposed by the Supreme Court was as follows:

> But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[63]

According to the *Braunfeld* case, therefore, there are two criteria to

61. *Id.* at 342 (emphasis added).
62. 366 U.S. 599 (1961).
63. *Id.* at 607.

avoid violating the free exercise clause of the first amendment. The governmental action must first have only an "indirect" effect on religion, and secondly, there must be no less burdensome way for the government to accomplish its purpose.[64] If a cemetery were moved to build low income housing, the effect on religion would obviously be only indirect, for there would be no intent to regulate religion itself. The question of whether there is a less burdensome way to fulfill the purpose would be answered in the negative. If the cemetery land is the only land available, there would be no less burdensome alternative.

The argument might be advanced that disinterring the dead would amount to the establishment of atheism. *McGowan v. Maryland*[65] was similar to the *Braunfeld* case except that the plaintiff in *McGowan* attacked the statute on the grounds that it constituted the establishment of a religion. In discussing the "Sunday Closing" laws, the Supreme Court stated that:

> [T]hey are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.[66]

If the program of moving cemeteries and building low income housing is attacked as interfering with the free exercise of religion, or as establishing a religion, the test would seem to be whether the purpose and effect is directly or indirectly felt by religion. As long as the purpose is secular and the effect is indirect, it would seem that first amendment arguments are of no avail.

The Right To Be Let Alone

Justice Brandeis first set down his theory of the "right to be let alone" in 1890.[67] In his dissent in *Olmstead v. United States*,[68] he expressed it for the Court:

> They sought to protect the Americans in their beliefs, their thought, their emotions and their sensations. They conferred as against the Government, *the right to be let alone*

64. Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77 (1970).
65. 366 U.S. 420 (1961).
66. *Id.* at 444.
67. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
68. 277 U.S. 438 (1927).

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> —the most comprehensive of rights and the most valued by Civilized man.[69]

The question may arise whether the right to be let alone or the right to privacy continues after death to become the "right to rest in peace." In *Ravellette v. Smith,*[70] the plaintiff was the wife of the decedent. The court rejected plaintiff's contention that taking a blood sample from her husband after his death was a violation of any of his constitutional rights.

> The law, frequently expressed, is that the rights guaranteed by the search and seizure provisions of state and federal Constitutions are personal rights. *Decedent's rights, being personal, could not survive his death and cannot validly be urged by plaintiff. The same reasoning applies to the asserted invasion of decedent's privacy.*[71]

Other cases seem to subscribe to this view,[72] and agree that when a person dies his constitutional rights die with him. In *Cordell v. Detective Publications, Inc.,*[73] the court refused recovery to a mother, who was suing for invasion of her deceased daughter's right to privacy, when the "lurid account of the brutal murder of her teenage daughter"[74] was published. The court decided that even though the publication was without the daughter's permission, it was "irrelevant since any right to recovery ended with her death."[75] The *Cordell* and the *Ravellette* cases make it clear that the right to privacy not only does not continue after death, but that no one has standing to raise a decedent's right.

In *Ravellette,* since there was a physical disturbance of the body, it would seem that there is no "right to rest in peace." The government can use the power of eminent domain and not worry about violating the constitutional rights of the dead. It would seem that the law is well settled that constitutional rights are "personal and cannot survive death." All of the discussion by the courts that the "repose of the dead should not be disturbed," and that the "tomb should remain sealed" is based on either emotion or policy and not on constitutional law.

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69. *Id.* at 478 (emphasis added).
70. 300 F.2d 854 (7th Cir. 1962).
71. *Id.* at 857 (emphasis added).
72. Cordell v. Detective Publications, Inc., 419 F.2d 989 (6th Cir. 1969); Gruschus v. Curtis Publishing Co., 342 F.2d 775 (10th Cir. 1965); Maritote v. Desilu Prods., Inc., 230 F. Supp. 721 (N.D. Ill. 1964).
73. 419 F.2d 989 (6th Cir. 1969).
74. *Id.* at 991.
75. *Id.* at 992.

CONCLUSION

The problem of overcrowding due to the population increase is becoming more acute every year. It is submitted that one method of alleviating the problem would be to move entire cemeteries so that low income housing could be constructed. Even after cemeteries are moved, they must be reconstructed so as not to take more land than needed. The obvious answer is in the use of the power of eminent domain. By using the power it has, the government could put the land to a more efficient use.[76]

Since the government already has the power of eminent domain and the law concerning disinterment was set out in 1856 in a case that has been almost universally followed,[77] there is apparently nothing to prevent this "more necessary" use of cemetery land.

In some instances, consent to remove the body may be obtained from the next of kin; where this can be done, the only compensation that the government needs to give is that necessary to move and reinter the body.[78] While the next of kin of the deceased may be able to demand compensation, there seems to be no way for them to prevent disinterment if the government can show that the power of eminent domain is being used 1) in the public interest, 2) for a more necessary public use and 3) to further secular goals which will have only an indirect effect on religion. It would seem that on constitutional grounds the taking of cemetery land to build low income housing would encounter no major difficulties. Opponents could not prevent the taking either on the ground that it violates the first amendment or that it is an invasion of the deceased's "right to rest in peace."

We can only hope that in the future the government will use the power that it has and furnish low income housing where it is needed. Moreover, the location of any future cemeteries should be more closely controlled. By proper planning, the problem could be avoided and there would be no need for condemnation.

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76. *See* note 36 *supra.*
77. *In re* Widening of Beekman St., 4 Bradf. Sur. 503 (N.Y. 1856).
78. *Id.* at 532.

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