INTEGRATING THE CITY OF THE DEAD: THE INTEGRATION OF CEMETERIES AND THE EVOLUTION OF PROPERTY LAW, 1900-1969[1]

I. INTRODUCTION

On July 3, 1969, an African-American soldier named Bill Terry, Jr., died in Vietnam.[2] Like generations of African-American soldiers before him, stretching back to the American Revolution, Terry died fighting for his country.[3] Because of his honorable Army record, Terry was given the traditional military escort back to his home in Birmingham, Alabama, where his body was taken to Elmwood Cemetery to begin the interment process.[4] When Terry's widow and mother attempted to purchase a burial plot for Terry's remains, they were refused by the cemetery manager. The reason: Terry was black.[5] Since the other funeral arrangements were already in place, Terry's widow[6] and mother purchased a plot in Shadow Lawn Memorial Park, a traditionally African-American cemetery,[7] and proceeded with the interment.[8]

During the same time period, another African-American was denied purchase of a burial plot at Elmwood,[9] and joined with Terry's widow and

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1. The author would like to thank Professor Alfred L. Brophy for his invaluable insight and guidance, Dr. S. Jonathan Bass, Assistant Professor of History at Samford University, for his direction and assistance in researching Bill Terry, Jr., and Grace Long for her help in reviewing this Comment.

2. Terry died from a fragment wound to the chest sustained during combat near Xuan Loc. Record of Preparation and Disposition of Remains, DD form 2775 (July 6, 1969) (Document contained in Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama).

3. Terry v. Elmwood Cemetery, 307 F. Supp. 369, 370 (1969).

4. Terry lived in the Wiregrass area of Birmingham, where his house looked onto the Elmwood Cemetery. Before he left for war, Terry informed his wife and mother that if he were to die in Vietnam, it was his wish to be buried in Elmwood. It was in the course of fulfilling Terry's wish that his mother and wife became plaintiffs in the instant lawsuit. *Id.*

5. *Id.*

6. Terry's young widow, Margaret Faye Terry, was only 16 years of age at the time. J.M. McFadden, *U.S. Court in Alabama Bans Segregated Cemeteries*, WASH. POST, Dec. 23, 1969, at A3. Terry also left behind a son, Patrick Donovan Terry, born August 16, 1968. A Memorial Service in honor of P.F.C. Bill Terry (Document contained in Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama).

7. Request for Payment of Funeral and/or Interment Expenses, DD form 1375 (July 17, 1969) [hereinafter Request for Payment] (Document contained in Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama).

8. *Terry*, 307 F. Supp. at 370. Terry was buried at Shadow Lawn on July 19, 1969. *See* Request for Payment, *supra* note 7.

9. Belvin Stout was denied purchase of a burial plot at Elmwood under similar circumstances as Terry's widow and mother. *Terry*, 307 F. Supp. at 370.

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mother in filing suit in federal district court against the cemetery.[10] The plaintiffs alleged[11] "unlawful discrimination against Negroes as a class by Elmwood, which discrimination constitutes a badge or incident of slavery contrary to the thirteenth amendment of the Constitution of the United States and the 1866 Civil Rights Act."[12] In response, the cemetery pointed to the rules and regulations adopted by Elmwood in 1954, which provided in pertinent part:

> Cemetery lots shall be owned only by human beings of the *white and/or Caucasian race* and the said lots shall be used only for burial of human bodies of the *white and/or Caucasian race*, and such ownership and use shall at all times be subject to the Rules and Regulations and By-Laws of Elmwood now or hereafter in force. Any attempted transfer of a lot or interest in a lot to one not authorized to own same shall be invalid and of no force and effect and the corporation shall not be obligated to honor such transfer.[13]

Based on this section, the cemetery stated that they were justified in refusing sale to Terry's wife and widow because Elmwood had "a policy of refusing burial in its cemetery to persons other than Caucasians which is based on the fact that all lot deeds for grave sites at the cemetery contain a provision limiting interment in Elmwood Cemetery to members of the Caucasian race . . . ."[14]

In arriving at their decision, the district court examined whether a burial plot constituted "property" under the 1866 Civil Rights Act.[15] After the court defined a property right as "that type of relationship which is entitled to protection from a decision maker,"[16] they determined that it may be "conclusively established that interests in cemetery lots are property rights."[17] Following a detailed analysis of property rights and a refutation of all of the defendant's arguments,[18] the court held that under the Act, Elm-

10. *Id.*

11. The Legal Defense and Education Fund of the NAACP represented both plaintiff parties in the suit. *See U.S. Court in Alabama Bans Segregated Cemeteries*, *supra* note 6.

12. *Terry*, 307 F. Supp. at 370-71.

13. *Id.* at 370 (emphasis added).

14. *Id.*

15. *Id.* at 373.

16. *Id.* at 374 (quoting H. COHEN, FUNDAMENTALS OF LAND USE LAW IX (1962)).

17. The court examined existing Alabama law and the common law of other states in making this decision. Certain characteristics that aided in the determination that burial plots were property were as follows: that it is possible to obtain title to a burial plot through adverse possession or prescription; that plots may be inherited or devised through intestate succession; and that the Alabama legislature has exempted the plots from "levy and sale, under execution or other process." *Id.* at 373-74 (quoting ALA. CODE tit. 7, § 628 (1958)).

18. The defendant made several arguments, including an attempt to refute the contention that burial plot owners have property rights in their plots by relying on general information from legal encyclopedias and *Smith & Gaston Funeral Dirs. v. Dean*, 80 So. 2d 227, 230 (Ala. 1955). The court dismissed this argument, stating that "these pronouncements may be explained away," *Terry*, 307 F. Supp. at 374-375, by noting that these same authorities later recognize in effect that burial rights are property interests

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wood was "legally obligated to sell burial plots in its public cemetery to all United States citizens, on equal terms, without regard to race or color, and has unlawfully abridged plaintiffs' rights under such statute by refusing to sell them cemetery lots solely because they are Negroes."[19] The court invalidated all of Elmwood's rules and regulations that were contrary to this holding, thus legally declaring that such race-based and discriminatory burial policies were no longer acceptable.[20]

Following an overwhelming outpouring of public support from both Birmingham and the rest of the country,[21] Bill Terry's body was subsequently exhumed and reburied in Elmwood Cemetery on January 3, 1970.[22] Twelve hundred marchers followed Terry's body from Our Lady of Fatima Church to Elmwood Cemetery, where Josephite Friar Eugene J. Farrell[23] told the marchers: "We are rejoicing, not mourning. This is not really a funeral march. This is a victory march for Billy and for truth and right."[24] Terry's body is now interred per his final wishes in Elmwood Cemetery, along with deceased Alabama governors, United States senators, one of the original members of the Motown Temptations, and legendary Alabama football coach Paul "Bear" Bryant.[25]

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and by "recognizing that the writers of these conclusions were struggling with the semantic problems inherent in the area." *Id.*

19. *Terry*, 307 F. Supp. at 377.

20. *Id.*

21. Hundreds of letters were mailed both to the Department of Defense and the President, Richard M. Nixon. *See* Documents contained in Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama.

22. An excerpt from one of the letters written to President Nixon reads as follows: "Dear Mr. President, I would like to know if a private in the United States Army, Pvt. Bill H. Terry killed in Viet Nam [sic] was refused burial in an all-white Birmingham Alabama cemetery around September of 1970. If so what did you do about it? Sincerely, Lanier Martin." Letter contained in the Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama. Another telegram from West Palm Beach, Florida read: "Where is the pride in being an American when an American like Bill Terry, who died for the sake of his country, is treated so shamefully? Mr. President I am ashamed. Are you? Sylvia Lewis." *Id.* Robert E. Jordan, III, who was at the time Special Assistant to the Secretary of the Army for Civil Functions, answered the bulk of these letters to President Nixon, often including the statement that "as a result of the Terry incident, the century-old custom of segregation in cemeteries was overruled in the Federal Court, and officials of the Elmwood Cemetery were directed to allow the burial of Corporal Terry." *Id.*

23. Eugene Farrell stated that "Birmingham may honor Bill with its bells; but its heart is turned from him." Eugene Farrell, *No Bells for Bill . . . Please*, 82(1) THE JOSEPHITE HARVEST 3 (Jan.-Feb. 1970) (Document contained in the Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama).

24. Eugene Farrell, *Current Comment*, 122(2) AMERICA (Jan. 17, 1970) (Document contained in the Dr. Jonathan Bass Collection, Box 7, Special Collections, Samford University Library, Birmingham, Alabama).

25. Others buried at Elmwood include Governors Braxton Bragg Comer (1907-1911), Russell McWhorter Cunningham (1904-1905), and Joseph Forney Johnston (1896-1900); noted social reformer Pattie Ruffner Jacobs; Motown's Eddie James Kendrick; Congressional Medal of Honor Recipient Sergeant Henry Eugene Erwin; and controversial Civil Rights era Birmingham Mayor Art Hanes, Sr. *See* Findagrave.com, *at* http://www.findagrave.com/cgi-bin/famousSearch.cgi?mode=cemetery&FScemetery id=22674 (last visited Nov. 8, 2003).

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II. THE LEGAL JOURNEY

Although by the time that *Terry* arrived in the court system in 1969 the resolution of the case in favor of the plaintiffs seemed to be a legal inevitability, this had not always been the prevailing jurisprudence. Numerous cemeteries across the country had—relatively recently—routinely denied burial plot purchase opportunities to African-Americans through different types of racially restrictive covenants, and unlike *Terry*, these covenants were upheld and enforced by the courts. Indeed, only 16 years before in *Rice v. Sioux City Memorial Park*,[26] it was estimated that around 90% of all public cemetery rules and regulations nationwide contained some sort of racially restrictive covenant, the reason being that "people, like animals, prefer to be with their own kind."[27] This once contentious issue began to appear in the judicial system much earlier than *Rice* in 1953, and it was a great deal more complex than a simple evolution from blind prejudice against the burial of non-Caucasians with Caucasians to recognition of the existence of racial equality.

A. *Early Developments*

Early cases appear to have been resolved in favor of enabling African-Americans and other non-Caucasians to purchase burial plots in the cemetery of their choice. Initial cases stated that plot owners had certain rights involving their cemetery plots.[28] One of the earlier cases that dealt with race, burial, and property rights was *Mount Moriah Cemetery Ass'n v. Pennsylvania*[29] in 1876. In *Mount Moriah*, the defendant cemetery association conveyed a burial plot to William H. Boileau, a Caucasian, who subsequently entered into a parol agreement to convey part of the plot to Margaret Jones, an African-American woman, in the presence of the superintendent and secretary of the cemetery association, who were both Caucasian men.[30] Jones and her African-American husband subsequently buried her sister there and began to conspicuously decorate and improve the plot. At no point did anyone voice opposition to the conveyance of the deed or the use of the lot by African-Americans.[31] When Jones's husband died, she wanted

26. 60 N.W.2d 110 (Iowa 1953).
27. *Id.* at 114.
28. The court in *Hertle v. Riddell*, 106 S.W. 282 (Ky. 1907), stated:

> Equity has jurisdiction to enjoin an unwarrantable disturbance or interference with a burial ground or the graves therein. An action of trespass quare clausum fregit may be maintained for breaking and entering a burial lot. One who is in the rightful possession of a cemetery lot, or who holds title to the usufructuary interest therein, may maintain an action against one who wrongfully trespasses upon it.

Id. at 284.

29. 1876 Pa. LEXIS 142 (Pa. 1876).
30. *Id.* at *3-*4.
31. Based on a proposal by a cemetery officer, Jones and her husband contracted with Daniel Connell to construct an iron railing with marble posts to enclose the burial plot which was marked "Henry Jones." *Id.* at *4, *6.

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to bury him in the plot as well. However, 15 minutes before the funeral was to begin, a note was left at the Jones residence from the aforementioned superintendent, stating that he would not be able to dig the grave for Jones's husband. The superintendent contended that the cemetery association viewed Boileau as the owner of the plot, thus only Boileau could order the superintendent to act.[32] The note was sent without delay to Boileau, who ordered that Jones be allowed to bury her husband in the plot.[33] When the note was given to the cemetery officer in charge, he admitted that the note was in order but continued to refuse the burial because of an "objection having been made by some of the lot-holders to the interment of colored people in the cemetery."[34] The funeral party was uninformed of this proscription and continued on their processional towards the cemetery until they were turned away by a delegation from the cemetery association informing them of the banned interment. Jones was then compelled to temporarily inter her husband in the receiving vault of another cemetery.[35]

Legal action commenced, and the defendant cemetery association claimed that Jones was not entitled to relief, with the secretary of the cemetery association answering Jones's complaint that they refused to permit the transfer of the lot to Jones by reporting that

> so great is the opposition on the part of a large majority of our many thousand lot-holders to the interment of colored persons in the cemetery among their deceased friends and relatives, that, if we were to permit it, it would probably lead to acts of violence and breaches of the peace, large numbers of the dead already interred therein would be removed . . . the association would be financially ruined and compelled to leave the thousands of existing graves to the result of abandonment and neglect, and those who have already paid us their money and obtained rights which it is our duty to protect, would thus be greatly wronged and injured.[36]

The Commonwealth demurred, and the court of common pleas issued an opinion which found that the refusal of the cemetery to allow the burial of Jones's husband was "arbitrary and unreasonable, and therefore an unlawful interference with the legal rights of the owner of the soil" and affirmed the demurrer for the Commonwealth.[37] On appeal, the judgment was affirmed.

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32. *Id.* at *7.
33. The exact message stated: "Dear Sir:—Please to let the bearer bury in the lot. W.H. Boileau." *Id.* at *8.
34. *Id.*
35. *Id.*
36. *Id.* at *12-*13.
37. *Id.* at *19-*22; *see also* Ritchey v. City of Canton, 46 Ill. App. 185, 185 (Ill. App. Ct. 1891) (holding that a fee-simple owner of a cemetery plot that subsequently comes under city control may not be deprived of any pre-existing right by city ordinances); St. Peter's Evangelical Lutheran Church v. Bean, 1906 WL 2748, at *4 (Pa. Com. Pl. 1906) (stating that cemetery councils may not abridge the rights of cemetery plot owners to manage their plots by any unreasonable means).

The court refused to acknowledge the decision of the managers as reasonable because of the racial prejudices that existed in the country at the time, stating that when the "prejudice is under the ban of recent constitutional and legal provisions, expressly designed for its suppression and extinction, it is scarcely to be expected that we can be induced to endorse its respectability—or to encourage it to linger longer around the halls of justice."[38]

Decades passed, and the culture of segregation started to take its toll on the court system. Courts began to render judgments in favor of the cemeteries, cemetery associations, and their racially restrictive covenants. In *Forest Lawn Memorial Park Association v. De Jarnette*,[39] the California District Court of Appeals ruled in favor of the plaintiff cemetery's policy that "no interment of any body or the ashes of any body other than that of a human being of the Caucasian race should be permitted in the said Forest Lawn Memorial Park."[40] The contract between the parties was found to be based upon a mistake of material fact, as the cemetery official who sold the cemetery lot to the African-American defendant believed her to be a Caucasian and testified that he "would not have entered into the said contract had [he] been advised as to the truth, or had [he] known that the said defendant was of the negro race."[41] After finding that the cemetery's policy of prohibiting burials of non-Caucasians was valid under California state law,[42] the court affirmed the lower court's judgment in favor of upholding the plaintiff cemetery's racially restrictive burial policy.[43]

B. Public Accommodation

Courts entering judgments in favor of the racist policies of defendant cemeteries also did so by determining that cemeteries were not places of public accommodation, and thus did not fall within the civil rights provisions designed to prevent discrimination within places of public accommodation.[44] In *Gaskill v. Forest Home Cemetery Co.*, the defendant cemetery passed an ordinance that only Caucasians could be buried in the cemetery, with the exception of those African-Americans who already owned plots in the cemetery and their direct heirs.[45] The plaintiff, an African-American

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38. *Mount Moriah Cemetery Ass'n*, 1876 Pa. LEXIS 142, at *26-*27; *see also* Richmond Cemetery Co. v. Walker, 97 S.W. 34, 34-35 (Ky. 1906) (holding that a cemetery corporation cannot prevent the African-American owners of a cemetery plot from burying African-Americans on the plot).

39. 250 P. 581 (Cal. Dist. Ct. App. 1926).

40. *Id.* at 582.

41. *Id.*

42. The court based this conclusion on the California Supreme Court's opinion in Los Angeles Inv. Co. v. Gary, 181 Cal. 680 (Cal. 1919), where the court found a Caucasians-only clause in a property deed to be a permissible restraint upon the use of property rather than an impermissible restraint on alienation. *Id.* at 683.

43. *Forest Lawn*, 250 P. at 583.

44. Long v. Mountain View Cemetery Ass'n, 278 P.2d 945, 946 (Cal. Ct. App. 1955); Gaskill v. Forest Home Cemetery Co., 101 N.E. 219, 220 (Ill. 1913); Rice v. Sioux City Mem'l Park Cemetery, Inc., 60 N.W.2d 110, 110 (Iowa 1953).

45. *Gaskill*, 101 N.E. at 220.

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man, had already buried four of his children in the defendant's cemetery prior to the passage of the ordinance, and when his African-American wife passed away he sought purchase of another burial plot in the cemetery. He was refused solely because of the race of his wife.[46] Cemetery officials told the plaintiff: "If the colored people did buy lots it would only make the neighbors angry and kick and remove to some other part of the cemetery or possibly to some other cemetery."[47] The court examined the plaintiff's complaint in light of the cemetery's position as a corporation looking out for its own financial interests, then moved on to the civil rights claims, namely that the refusal of a burial plot was contrary to the state's public accommodations statute.[48] The statute in question enumerated several places of public accommodation (railroads, street cars, funeral hearses, and others) but did not list cemeteries. The court reasoned that because cemeteries are not equivalent to the places that the statute enumerated, and because there was a provision dealing solely with cemeteries, the legislature did not intend to include cemeteries within the protections afforded places of "public accommodation and amusement."[49] Based on this reasoning, the court held for the defendant, finding that none of the plaintiff's constitutional rights were violated by the defendant's refusal of sale.[50]

In another case where the court relied on public accommodation statutes in refusing to overturn the denial of a burial plot purchase to non-Caucasians, a wife sued for breach of contract because the cemetery refused to bury her non-Caucasian husband.[51] The cemetery's defense was that the contract stipulated that "burial privileges accrue only to members of the Caucasian race."[52] The court reasoned that since the Iowa legislature had not included cemeteries in their list of locations covered by the state civil rights statute (where it had included motels, restaurants, and others), the principle *expression unius est exclusion alterious*[53] applied. Since the state did not choose to include private cemeteries in the statute, the court would not extend discrimination protections to cover the instant situation.[54] Rice

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46. *Id.*
47. *Id.*
48. *Id.* at 220-21.
49. *Id.* at 221. The special provision dealing with cemeteries provided that "there shall be no discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or for burying the dead." *Id.* The court reasoned that the special provision would not be necessary had cemeteries been included in the original statute, and that since the special provision exists, cemeteries must necessarily be excluded from the statute's protections. *Id.*
50. *Id.*
51. *Rice*, 60 N.W.2d at 110. The plaintiff's husband, who was killed while serving in Korea, was eleven sixteenths Winnebago Indian (the court stated that it was clear that a person of his blood was legally not a Caucasian). *Id.* at 114.
52. The cemetery interrupted the plaintiff's husband's funeral ceremony, refused to permit his body to be placed into the grave after the completion of the graveside services, and removed the deceased's body from the burial site. *Id.* at 112, 118.
53. This is a method of construing a statute, and means that including one thing implies the exclusion of another. BLACK'S LAW DICTIONARY 602 (7th ed. 1999).
54. *Rice*, 60 N.W.2d. at 116.

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appealed to the Supreme Court,[55] and the Court vacated the judgment of the Iowa Supreme Court and dismissed the writ of certiorari as improvidently granted.[56]

Although the original *Rice* decision is no longer controlling law, *Rice* made an impact on the jurisprudence of race-based denials of burial rights before the Supreme Court issued its final opinion. The *Long* court cited both the *Gaskill* and original *Rice* decisions in an opinion holding that a woman who was refused purchase of space in a "Caucasian-only" mausoleum for her non-Caucasian husband was not entitled to damages.[57] The cemetery maintained three separate mausoleums, with one reserved solely for the burial of Caucasians.[58] The plaintiff requested a space in the Caucasian-only mausoleum and would not accept space in either of the other mausoleums, although she did not claim that the others were inferior to the preferred mausoleum.[59] In determining whether the plaintiff was entitled to damages, the court examined the state's full and equal accommodation statute and found that usage of the phrase "all other places" implied that the protection was limited to places "of a like nature to those enumerated."[60] Since burial space in a mausoleum was not "like" a restaurant or hotel, the court concluded that the statute was not violated by the defendant cemetery's refusal of purchase and that the plaintiff was not entitled to damages.[61] Justice Kaufman went so far in his concurrence as to suggest that the protections in the statute were afforded only to "living citizens of this state."[62] Since the now-living plaintiff was not denied access to the cemetery and her husband was obviously deceased, the defendant cemetery had done nothing to offend the statute.[63] In an oft-cited concurrence in this area of jurisprudence, Justice Dooling stated that he concurred with the *Long* majority, but that he could not

55. Rice v. Sioux City Mem'l Park Cemetery, 347 U.S. 942, 942 (1954).

56. Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 77 (1955). The Court vacated its earlier affirmance because Iowa enacted a statute after the suit began that prevented the question presented by the suit from arising again in Iowa, leaving questions raised by the suit unaddressed. Because of this, Justice Black dissented from the vacating order, stating: "We granted certiorari because serious questions were raised concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Those questions remain undecided." *Id.* at 80.

57. *Long*, 278 P.2d at 946.

58. *Id.* at 945.

59. *Id.*

60. The examined section stated:

> All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream and soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

Id.

61. *Id.* at 946.

62. *Id.* (Kaufman, J., concurring).

63. *Id.* (Kaufman, J., concurring).

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> believe that a man's mortal remains will disintegrate any less peaceably because of the close proximity of the body of a member of another race, and in that inevitable disintegration [it is] sure that the pigmentation of the skin cannot long endure . . . . The good people who insist on the racial segregation of what is mortal in man may be shocked to learn when their own lives end that God has reserved no racially exclusive position for them in the hereafter.[64]

As *Gaskill*, *Long*, and *Rice* demonstrate, the passage of public accommodation laws across the country between the years of 1913 and 1955 to protect minorities did not necessarily compel courts to interpret those statutes as covering cemeteries and burial plot purchases by minorities or for minority use.

C. *Covenants*

Case outcomes began to shift back in favor of the African-American plaintiffs in general property claims when courts analyzed the claims as racially restrictive covenants, with cases often turning on the various definitions of precisely what constituted state action. In the landmark case on racially restrictive covenants, *Shelley v. Kraemer*,[65] the Supreme Court held that equitable enforcement of racially restrictive real estate covenants represents state action in violation of the Fourteenth Amendment's guarantee of equal protection.[66] The *Shelley* Court stated that "[t]he difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."[67] The Court put a finer point on *Shelley* in *Barrows v. Jackson*,[68] recognizing that when state courts award damages for breach of restrictive covenants to Caucasians, it means that non-Caucasians are necessarily deprived of the equal protection guaranteed by the Fourteenth Amendment, regardless of whether they are identified in the suit.[69] While *Shelley* and *Barrows* both dealt specifically with the purchase of residential real estate rather than burial plots,[70] the logic of the Court should be equally applicable to denials of burial plot purchases since the Court had previously defined burial plots as property.[71]

64. *Id.* (Dooling, J., concurring).
65. 334 U.S. 1 (1948).
66. *Id.* at 19.
67. *Id.*
68. 346 U.S. 249 (1953).
69. *Id.* at 259.
70. *Barrows* involved a racially restrictive covenant on residential real estate in Los Angeles, California, and *Shelley* concerned a racially restrictive neighborhood covenant in St. Louis, Missouri. *See Barrows*, 346 U.S. at 251; *Shelley*, 334 U.S. at 4.
71. Terry v. Elmwood Cemetery, 307 F. Supp. 369, 373 (1969).

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The state action reasoning of *Shelley* and *Barrows* steered the analysis of a 1961 burial rights decision, *Erickson v. Sunset Memorial Park Ass'n.*[72] In striking down a cemetery association's policy of denying burial to non-Caucasians, the *Erickson* court analyzed previous court decisions to ascertain precisely what constituted state action.[73] The court began with one of the first definitions of state action, found in *The Civil Rights Cases*.[74] These cases held that the Fourteenth Amendment's purpose was to prevent injustices arising from "state" as opposed to "private" action; therefore, any claims of discrimination resulting from "private" action were not covered by the Fourteenth Amendment's protections.[75] The *Shelley* court effectively overruled this aspect of *The Civil Rights Cases* by holding that a state's enforcement of racially restrictive covenants constituted state action and thus discrimination within the definition of the Fourteenth Amendment.[76]

Next, the *Erickson* court examined *Barrows*, where the Supreme Court extended *Shelley*'s logic to those seeking damages for breach of contract on racially restrictive covenants.[77] In denying such damages, the court held that awarding these damages would be yet another way of putting the power of the state behind racially restrictive covenants.[78] The court then moved to *Rice*, upon which the defendants in the instant case relied heavily.[79] After an examination of previous cases, the court stated that it was not necessary to "reconcile or evaluate" these decisions because the instant situation could be resolved through state law, which provided that "[n]o written instrument . . . relating to or affecting real estate, shall . . . contain any provision . . . discriminating against any class of persons because of their religious faith, race, or color."[80] Based on the application of this statute, the refutation of other defenses,[81] and the fact "that Minnesota by legislative action has clearly set its policy against all forms of religious or racial discrimination,"[82] the court affirmed the lower court's decision that the restrictive covenant which denied burial to non-Caucasians was void under the statutes and public policies of the state.[83]

72. 108 N.W.2d 434 (Minn. 1961).
73. *Id.* at 437-38.
74. 109 U.S. 3 (1883).
75. *Id.* at 17.
76. *Shelley*, 334 U.S. at 19.
77. *Erickson*, 108 N.W.2d at 437-38.
78. *Id.* at 438.
79. *Id.* at 439.
80. *Id.* (quoting MINN. STAT. § 507.18).
81. The court also rejected defenses based on claims that § 507.18 did not apply to instruments affecting cemetery lots and their peculiar nature of being maintained by members of certain religious faiths. *Id.* at 439-40.
82. *Id.* at 441.
83. *Id.* at 443.

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D. The Civil Rights Act of 1866

Other courts ruled in favor of African-American plaintiffs on property claims in racial discrimination cases based on the modern interpretation of the Civil Rights Act of 1866.[84] Prior to June 17, 1968, it was the common perception in both legal interpretation and daily life that the Civil Rights Act of 1866 did not prohibit private discrimination.[85] Both the timing of the passage of the Civil Rights Act—coming on the heels of the Civil War[86]—and the "state action" limitations of the Fourteenth Amendment[87] contributed to this popular misconception.[88] In *Jones v. Alfred H. Mayer Co.*,[89] the Supreme Court corrected this misapplication, with Justice Stewart decrying that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[90] Justice Stewart closed his opinion by proclaiming that

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please" would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.[91]

The *Jones* Court held that the Civil Rights Act[92] barred "*all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, [was] a valid exercise of Congress to enforce the Thirteenth Amendment."[93]

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84. The Civil Rights Act of 1866, ch. 31, § 1, 42 U.S.C. § 1982 (1964), provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.*

85. Bruce W. Keny, Comment, *Constitutional Law—The Right for an Individual to Buy Property Under 42 U.S.C. § 1982*, 8 WASHBURN L.J. 268, 268-71 (1969).

86. *See* Case Comments, *Civil Rights: Housing Discrimination—Revival of Civil Rights Act of 1866*, 53 MINN. L. REV. 641, 641 (1969).

87. *See* Keny, *supra* note 85. The Thirteenth and Fourteenth Amendments were not necessarily intertwined with § 1982 until *Corrigan v. Buckley*, 271 U.S. 323 (1926). In *Corrigan v. Buckley*, the appellate court, later affirmed by the Supreme Court, stated:

> The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property . . . . The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendant's rights under the Constitution, there can be none under the statutes.

299 F. 899, 901-02 (D.C. Cir. 1924).

88. While the Court struck down racially restrictive covenants, they simultaneously refused to apply § 1982 to private actors. *See, e.g.*, Hurd v. Hodge, 334 U.S. 24, 24 (1948).

89. 392 U.S. 409 (1968). The lower courts dismissed the case based on the "state action" doctrine, but the Supreme Court did not address the state action doctrine and instead based its decision on the Thirteenth Amendment. *Id.* at 409.

90. *Id.* at 442-43.

91. *Id.* at 443 (footnotes omitted).

92. 42 U.S.C. § 1982 (1964).

93. *Jones*, 392 U.S. at 413.

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E. Later Developments

In several of the more recent burial rights cases, courts[94] have attempted to delineate criteria and describe circumstances that would constitute a violation of a person's civil rights as they apply to the purchase of burial plots in cemeteries and spaces in mausoleums. In *Spencer v. Flint Memorial Park Ass'n*,[95] the African-American plaintiff sought to prevent the defendant cemetery from enforcing its restrictive burial policy, which prohibited the burial of African-Americans in the cemetery.[96] The court was asked to determine whether it would be a violation of the African-American plaintiff's civil rights under the Fourteenth Amendment to enforce the racially restrictive covenant against the burial of African-Americans.[97] The court adopted the reasoning and logic of the trial court and quoted the trial judge, Stewart A. Newblatt, who stated bluntly:

> This court is now being asked to pass on the question of whether a cemetery association may refuse to permit an owner of a lot the right to bury a Negro in that lot. In a sense, it seems highly grotesque to spend such time and legal effort in considering the rights of dead soulless bodies when we have not as a society yet secured full rights for the living.[98]

The court took care to state that the opinion did not prohibit cemeteries of particular faiths from excluding from burial in their cemetery those not of their particular faith, and emphasized that this type of prohibition was not at issue.[99] In affirming the lower court's judgment for the African-American plaintiff,[100] the court also echoed the *Erickson* court's conclusion[101] that the Fourteenth Amendment's prohibition against state action in the enforcement

94. Most of the more recent cases have come from the federal district and appellate courts or the state supreme courts rather than the U.S. Supreme Court, which had earlier been essential in extending civil rights protections to burial plot purchases and cemeteries. *See, e.g.*, Spencer v. Flint Mem'l Park Ass'n, 144 N.W.2d 622 (Mich. Ct. App. 1966); Erickson v. Sunset Mem'l Park Ass'n, 108 N.W.2d 434 (Minn. 1961); Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074 (5th Cir. 1978).

95. 144 N.W.2d 622 (Mich. Ct. App. 1966). The *Shelley* case came to the Supreme Court with a companion case from the Michigan Supreme Court, *McGhee v. Sipes*, 334 U.S. 1 (1948). Prior to the outcome of these cases, Michigan viewed racially restrictive covenants on sale or transfer of title as invalid, but viewed racially restrictive covenants on use and occupancy in general as valid and enforceable against the complaining non-Caucasian party. *See, e.g.*, Sipes v. McGhee, 25 N.W.2d 638, 638 (Mich. 1947); Schulte v. Starks, 213 N.W. 102, 102 (Mich. 1927); Porter v. Barrett, 206 N.W. 532, 535 (Mich. 1925); Parmalee v. Morris, 188 N.W. 330, 330 (Mich. 1922).

96. *Spencer*, 144 N.W.2d at 623.

97. *Id.*

98. *Id.*

99. *Id.* at 628-29.

100. *Id.* at 630.

101. *Erickson*, 108 N.W.2d at 434-35.

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of racially restrictive covenants applies to cemetery law and burial rights as well.[102]

However, merely claiming a civil rights violation is not enough to secure a victory for the complaining party, as seen in *Save Our Cemeteries v. Archdiocese of New Orleans, Inc.*[103] The *Save Our Cemeteries* court addressed the city's prohibition against any future burials in the wall vaults of a dilapidated and deteriorating cemetery,[104] where the plaintiffs claimed the prohibition violated both the Sherman Act[105] and civil rights laws.[106] The court examined the appellants' claims for state action and racial discrimination, both necessary findings for the appellants to prevail.[107] Since the cemetery association director swore an affidavit that the cemetery had no connections with state bodies,[108] and the trial court found that the cemetery did not racially discriminate when it followed the health department's recommendations, the appellate court found that summary judgment for the appellees on these claims was indeed appropriate.[109] Because the court found that the appellants did not have subject matter jurisdiction for their Sherman Act claims,[110] and the district court's dismissal of the appellant's civil rights claims was proper, the court affirmed the district court's findings.[111] Unsatisfied with this result, the appellants sought a rehearing[112] and petitioned for a writ of certiorari,[113] but both were denied.

III. CONCLUSION

Although it is now more than fifty years old and its holding has been thoroughly rejected by changes in the courts' interpretations of the Civil Rights Act of 1866, the original *Rice* decision continues to cast a shadow on

102. *Spencer*, 144 N.W.2d at 628.
103. 568 F.2d 1074 (5th Cir. 1978).
104. The New Orleans Department of Health instructed the Roman Catholic Church of the Archdiocese of New Orleans and New Orleans Archdiocesan Cemeteries, Inc., the appellees in this case, that no further burials should take place in St. Louis Cemetery No. 2 because of the unsuitable conditions of the wall in the cemetery. *Id.* at 1076.
105. In order to prevail on a Sherman Act claim, the appellants had to prove that the district court had subject matter jurisdiction (that is, that the appellees were engaged in interstate commerce). Morgan v. Odem, 552 F.2d 147, 149 (5th Cir. 1977).
106. The appellants also brought a claim under the National Historic Preservation Act. *Save Our Cemeteries*, 568 F.2d at 1076.
107. *Id.* at 1077-78.
108. The affidavit specifically stated that the organization "controls, manages, and operates (St. Louis Cemetery No. 2) as a private, religious cemetery, entirely free from any contract, arrangement, or supervision by any public body." *Id.* at 1077.
109. *Id.* at 1078.
110. Rather than proving that the appellees were engaged in interstate commerce as required by caselaw, the appellants instead made the conclusory statement that the appellees were "engaged in interstate commerce and/or in business affecting and involving interstate commerce." *Id.* at 1076. Once the appellants introduced the affidavit of the cemetery director stating exactly the contrary of the appellees' conclusion, the appellate court found that the district court properly dismissed the appellant's Sherman Act claims. *Id.*
111. *Id.*
112. Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 572 F.2d 320 (5th Cir. 1978).
113. Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 439 U.S. 836 (1978).

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legal treatises. The 2000 edition of *American Jurisprudence* incorrectly states that "regulations of cemetery associations restricting the right of burial to members of a particular ethnic group or race will be upheld."[114] This is yet another example of what Professor Jack Chin has referred to as "Jim Crow's long goodbye," a reference to its lingering presence in modern legal doctrines.[115] In the mind of the *American Jurisprudence* editors, Jim Crow has not yet left, even though the law the editors announce changed decades ago.

From the beginnings of this nation, soldiers have fought and died for the freedoms guaranteed by the Constitution. Tragically, some—like Bill Terry—were initially denied the guarantees of that very document when first de jour and then de facto segregation kept them from the ground that was their desired final resting place. By striking down racially restrictive property laws, first in the residential housing context and then—as the courts refined the definition of "property"—in burial plots and cemeteries as well, the courts forced those Americans who were hesitant at best and fiercely racist at worst to embrace the freedoms promised to every citizen of our great nation. As the courts assessed the various claims of the plaintiffs in light of the Civil Rights Acts, other civil rights statutes, the Thirteenth and Fourteenth Amendments, the state action doctrine, and evolutions in general property law, the courts—while straying at times—eventually came to the same conclusion: the right to burial in the cemetery of one's choice is an equal right for all citizens, regardless of race.

Kitty Rogers

114. 14 AM. JUR. 2D *Cemeteries* § 38 (2000) (citing Rice v. Sioux City Mem'l Cemetery, 60 N.W.2d 110, 110-12 (Iowa 1953); Seligman v. Mount Ararat Cemetery, Inc., 492 N.Y.S.2d 445, 447 (N.Y. App. Div. 1985)). *Seligman* relates to exclusion from burial for religious, rather than racial purposes. 492 N.Y.S.2d at 447. Hence, the cemetery in that case was not subject to the Civil Rights Act of 1866.

115. GABRIEL J. CHIN, 21 CONSTITUTIONAL COMMENTARY 107 (2004).

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