

## *Appendix B*

### Expert Reports of Broyde, Katz, McGuckin, Pals, and Sullivan

IN RE: WARNER, ET AL V. CITY OF BOCA RATON  
CASE NO 98-80554-CIV-RYSKAMP  
EXPERT REPORT OF MICHAEL J. BROYDE

This report will address the following issues:

Does the Jewish faith permit the removal of grave markers, tombstones, foot markers and other stone items from a grave to be replaced with a different form of a marker that is less visible?

Does the Jewish faith permit one to be buried without a full tombstone?  
What exactly constitutes a “full” headstone?

In order to answer both of these two questions, a brief background to the Jewish faith, Jewish law and its methodology generally needs to be provided. Many areas of Judaism are fundamentally regulated by the legal aspects of the Jewish tradition, commonly referred to as *halacha*, Jewish law; the role custom plays in those technical areas of Jewish law is relatively small. Thus, for example, there is an intricate analytical discussion of when is abortion permissible, prohibited or mandatory in Jewish law. This discussion contains nearly no mention of “custom”<sup>1</sup> as determinative of normative Jewish law. Jewish law in that context refers to the legal codes that govern Jews.

However, Judaism is as much a faith, a system of practices and religion as a legal system, and there are any number of areas of Jewish practice that are intensely governed by tradition—the ancient customs and practices of the Jewish people—as much as law. In some of these areas, law plays a very small role, in that the classical Talmudic law codes say very little about how to engage in certain rites and rituals. Burial and funeral rites and practices are such an area. The Talmud and its related codes do not treat this area of Jewish practice as governed by the same type of legal norms as other areas of Jewish practice. However, this in no way shape or form diminishes the strength of the Jewish tradition in this area. One is frequently dealing with customs that are more than 2,000 years old, and an intrinsic part of the Jewish faith. To examine Judaism in a way that is limited to its legal traditions and only protect those faith-grounded rituals and rites that the Jewish faith labels “law,” rather than “tradition,” would be a vast misunderstanding of the Jewish faith, and improper. As a simple example of that, consider that the right of men to keep their head covered, as a sign of their faithfulness in God, is “merely” a matter

<sup>1</sup>Hebrew, *minhag*, which literally refers to the practices of the people.

of ancient tradition according to the Jewish tradition, and not formally a matter of Jewish law. That distinction is fundamentally irrelevant, particularly when the Jewish faith is examined to determine whether any particular activity is permissible (or prohibited) to adherents of Judaism. Jews sincerely view—and the Jewish law and tradition accept—that there is a religious duty placed upon Jews to adhere not only to the technical obligations of Jewish law, but even on the duties imposed by ancient custom and tradition. To parse the Jewish faith into “law” and “tradition,” and then to assert that “traditions” are not really part of the corpus of Jewish practices that faithful adherents need to live their lives observing, fundamentally misunderstands what practicing Judaism is.<sup>2</sup>

Jewish funeral practices focus on two concepts: (1) that which honors the deceased, and that (2) which honors the living. Except for the duty to bury speedily, tradition—rather than law—govern nearly every aspect of this rite. Thus, for example, as noted by Rabbi Moses Feinstein (*Iggrot Moshe, Yoreh Deah* 4:57), the obligation to place a marker of some type on a grave is derived from the fact that the bible notes that the patriarch Jacob marked the grave of his wife, Rachel, with a gravestone or marker, so that people will know where she is buried (See Genesis 35:20).<sup>3</sup> Thus, one can state with a high degree of confidence that the obligation to place a marker of some sort is quite ancient, and that one who buries without any marker is severely in violation of Jewish law and tradition.

One can see that the Jewish faith viewed the placing of a marker as mandatory, and not merely a matter of discretion from the fact that there is an intricate dispute within Jewish law as to who bears the financial burden of fulfilling the custom of erecting a tombstone. Thus, the Pitchai Teshuva (*Shulchan Aruch Yoreh Deah* 356:1), cites a response of Rabbi David Ibn Zimra (15th century, Egypt) that one must use public charity funds not only to bury a poor person, who has no money but even to build a tombstone for him as that is a form of activity which honors the deceased, and thus must be done, even at public expense.<sup>4</sup> So, too, Rabbi Ibn Zimra rules that a Jewish court may require that the heirs of this individual spend their money to not only build a tombstone, but to

<sup>2</sup> Of course, that does not stand for the proposition that all matters of “tradition” or even all matters of “law” are on the same level. Some traditions are less sacred than others are, and some laws require less pressing circumstances than others to be relieved of the obligation to observe them. Suffice it to note that the obligation to mark a grave is a very ancient one (as noted on page 2 of this report), and that the Jewish tradition is prepared to discuss who must pay to observe this custom, an indication that the custom must be kept.

<sup>3</sup> Indeed, there is quite a dispute within Jewish law as to how one is supposed to build a tombstone; should it be made from a single stone or from a collection of stones? If it is to be a collection, how many stones should be collected? For more on this dispute, and how one contemporary American decisor resolved this issue, see Rabbi Moses Feinstein, *Iggrot Moshe Yoreh Deah* 4:57.

<sup>4</sup> Indeed, the Jewish tradition seems to favor the custom of erecting a tombstone to honor a deceased person even when the body of the person cannot be found, as such conduct minimally honors a dead person even when their body cannot be found; see *Iggrot Moshe Yore Deah* 4:57(6).

build a proper tombstone, similar in type to other tombstones found in that cemetery. Jewish law will enforce a duty not to deviate from the customs and norms of the community.<sup>5</sup>

The Jewish tradition does not regulate exactly of what type and manner should the deceased be memorialized. However, the custom and practice provides some guidelines.

A deceased should not be marked with a tombstone that is less than the normal proper tombstone used in any given Jewish society; to provide a deceased person with less of a marker than those given to his peers is irreverent to that deceased person. (*Shulchan Aruch, Yoreh Deah* 364:2, and Comments of Rabbi Shabtai ben Meir Hacoen (*Shach*), 3&12.)

One should note that the Jewish tradition treated tombstones with a form of sacredness; once a tombstone was used to mark a person's grave it could not be reused for any other person or other purpose; tombstones belongs to the person who was buried near it. See *Bet Yosef*, commenting on *Tur, Yoreh Deah* 364(1) and *Rama Shulchan Aruch, Yoreh Deah* 364:1, who notes that even sitting on a tombstone while visiting the dead was wrong. Indeed, one who was working on writing a tombstone for a deceased person has the same status of one who was working to actually bury the person, as the burial is not complete until the proper tombstone is erected; See *Tur, Yoreh Deah* 365, and Rabbi Yecheil Mecheil Tukachensky, *Gersher Hachaim* 25:1.

What exactly constitutes a "proper" tombstone differs from location to location. At least three different customs can be found in the Jewish tradition:

One custom was that a tombstone was placed actually on the grave itself, instead of some of the earth, and this tombstone marked the gravesite itself, in that under this stone was the corpse.

One custom was that the full length of the corpse was covered with stones (typically 12), so that one could tell not only that there was a body at rest here, but where exactly the beginning and end of the body was.

One custom placed the tombstone before the head of the body, such that the tombstone did not rest on the same location as the body itself.<sup>6</sup>

Each of these customs has a valid place in the Jewish tradition, and is a reasonable expression of the normative Jewish practice.<sup>7</sup>

<sup>5</sup> This responsa ("responsa" is the term used to denote a question and answer of the type presented to Ibn Zimra) is important, as it shows that the Jewish tradition clearly views the obligation to build a tombstone as more than a mere custom of the type that one can choose to fulfill or not, but a duty that the law—Jewish law—will enforce.

<sup>6</sup> All three of these customs are explained and commented on by Rabbi Yecheil Mecheil Epstein, *Aruch Hashulchan Yoreh Deah* 364. He argues there that the removal of tombstone markers in customs 1 and 2 entails a greater violation of Jewish law than in custom 3, as in custom 3 the tombstone is not directly on the grave. I am uncertain if that argument is correct.

<sup>7</sup> Indeed, the issue of which type of marker is viewed as "better" according to Jewish law depends on what purpose a tombstone is supposed to serve. Some think that the minimal purpose of a tombstone is to prevent people from walking on the grave, in which case a marker to the side is less than ideal. Others think that the primary purpose of the tombstone is to

Once a tombstone is provided for a deceased, that deceased person has a property type right in that tombstone, and diminishing it is improper.

Thus, *Shulchan Aruch Yoreh Deah* 364:1 (and commentaries *ad locum*), the classical code of Jewish law, mandates that tombstones may not be removed, and when broken they have to be replaced by similar tombstones—similar in height, status, beauty and other measures. For an example of how far this concept is carried, Rabbi Moses Feinstein rules that when the letters on an old tombstone are washed away by age, and one wishes to place a new tombstone in its place, one may not write fewer words of praise for the deceased on that new tombstone than was on the original one, as such a diminution of worth of praise violates the rule prohibiting one from diminishing the honor to the deceased; see *Iggrot Moshe Yoreh Deah* 1:228.

With these two rules in mind, we can now return to our initial questions and examine whether Jewish law would view the removal of existing tombstones from a cemetery and to have them replaced with a mere marker. The answer to that question is quite clear: The removal of tombstones and their replacement with a marker of lesser status would constitute a violation of Jewish law.

Such an activity would infringe on the rights of the deceased, and would be improper according to Jewish law. It is my view that the relatives of the deceased would have a “right of action” in Jewish law to compel such activity to stop, as it violates Jewish law.

The second question—can such a regulation be promulgated prospectively, and restrict what type of tombstone can be used from now on—is more complex, and requires a more complex answer. As a matter of theory, Jewish law would see no problem with a Jewish society deciding to mark its graves with markers, rather than tombstones or full covers. In such a society, all the graves would be marked in that way, and no one would view such a marker as irreverent to the deceased individual. Many cemeteries in Israel (particularly for Jews from Arab lands) adhere to this view even currently (even though such is not the normal practice in America). However, in my view, Jewish law and tradition would not permit such to be done in a cemetery already in existence with classical tombstones and coverings already in place, as the new—and less visible markers—that would be put in place for those who are recently buried are denigrating to those who are buried next to those who have classical tombstones. People will think that those who have smaller markers were lesser people.

With that concept in mind, one can understand why the Jewish tradition did not allow for a pauper’s cemetery, and instead mandated that all Jews be buried in the same type of cemetery; see *Shulchan Aruch Yoreh Deah* 356:1 and commentaries there.

In sum, a regulation which changes the type of markers used in Jewish cemeteries, and does so by actually removing tombstones and markers currently in place clearly violates Jewish law, and infringes on the free exercise rights of adherence to Judaism when this is done to graves owned by Jews. A governmental regulation which prospectively requires small markers, rather than

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memorialize the deceased, in which case a visible tombstone is most proper. For a long essay on this topic, see *Gersher HaChaim* in chapter 25:1.

tombstones or any other type of marker, might not violate Jewish law, so long as such a regulation is confined to new cemeteries (or maybe new sections in old cemeteries), and thus prevents the comparison of the relative merits of different deceased people.<sup>8</sup>

I have agreed to a wage rate of \$100 per hour for my work as an expert in this case. As with all fees that I earn for explaining Jewish law, I hereby assign any income I earn from this matter to the “Charity Fund of the Congregation,” Young Israel of Toco Hills, Atlanta, located at 2074 Lavista Road, Atlanta, Georgia, 30329.

I have been deposed a number of times about matters of Jewish law, both in the courts of the State of Georgia and in the courts of the State of New York. So too, the Beth Din of America is occasionally called on to provide advice to various courts about matters of Jewish law. This is the first time I have actually written an “expert witness report” as governed by the Federal Rules of Evidence, Rule 702.

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Michael Broyde published more than 50 articles in various aspects of Jewish law. His first book, *The Pursuit of Justice and Jewish Law* was published by Yeshiva University Press and his second, *Human Rights and Judaism* by Aronson Publishing House. He is the author of a recent article in the Connecticut Law Review entitled “Cloning People: A Jewish View,” and a forthcoming book tentatively entitled *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America*.

This expert opinion is written both in the capacity of a professor of Jewish law and as a member of a Jewish law court. This expert opinion represents the formal view of the Beth Din of America on this matter.

<sup>8</sup> The expert report submitted in support of the defendants, which maintains that Jewish tradition allows for the removal of tombstones and their replacement with simple markers, seems profoundly flawed in that it does not distinguish between removing markers already in place and prospectively prohibiting new tombstones.

More generally, the expert report seems defective in its understanding of Jewish tradition and Jewish law; the distinctions between “law” and “custom” are not generally supportable in this context. Indeed, it is unclear if the expert who wrote the report can read Hebrew, the *lingua franca* of Jewish law—there are essentially no references to classical Jewish law sources at all.

## EXPERT REPORT OF NATHAN KATZ

The question I investigated is as follows: What are the requirements of the major religions of this area—Catholicism, Protestantism, Judaism, and Islam—as regards markers or monuments at gravesites?; and, Do the rules governing the Boca Raton Municipal Cemetery contravene these religious requirements?

In order to answer this question, I (1) investigated burial and funerary practices of Catholics, Protestants and Jews; (2) interviewed a number of clergy who are familiar with this issue; (3) consulted standard sacred lawbooks, such as *The Code of Canon Law* (Catholic) and the *Shulchan 'Arukh* (Jewish); (4) visited the Boca Raton Municipal Cemetery on October 23, 1998, and interviewed the manager, Mr. Curtis L. Harris; and (5) I studied the *Rules and Regulations of the Boca Raton Municipal Cemetery and Mausoleum*.<sup>1</sup> I commissioned a student to assist with parts of this research.

My findings are that the rules of the Boca Raton Cemetery do not conflict with the religious requirements of Catholics, Protestants, Jews, or Muslims.

## CATHOLICISM

The Roman Catholic Church has very minimal requirements regarding markers or memorials. In fact, in reading Canon Law on the subject of funerals and related topics, no specific mention of markers or memorials is found.<sup>2</sup>

In part at least, the Canons silence on the topic of markers and memorials is due to its delegation of the implementation of its principles to local religious authorities. As Canon 1243 teaches: "Particular law is to determine appropriate norms on the discipline to be observed in cemeteries, especially regarding the protecting and fostering of their sacred character."<sup>3</sup> Catholic tradition understands this law as follows: "This canon is another example of the Code's emphasis on subsidiarity, leaving details of the legislation to local churches."<sup>4</sup> In other words, beyond a few basic principles, local dioceses may set and enforce appropriate standards.<sup>5</sup>

The Church is clear that specifically Catholic cemeteries are to be established, and that burial there is preferred: "The Church is to have its own cemeteries wherever this can be done, or at least spaces in civil cemeteries destined

<sup>1</sup> Rules and Regulations of the Boca Raton Municipal Cemetery and Mausoleum (photocopied document, no date, made available by Curtis L. Harris, October 23, 1998).

<sup>2</sup> In reading through *The Code of Canon Law: A Text and Commentary* (The Office of Sanctifying in the Church), pp. 837–42, with Mr. Frank Villaronga of the Archdiocese of Miami, I found absolutely no mention of markers or memorials, although many other topics—rites, cemeteries, offerings, death registers, ecclesiastical/lay rites, etc.—are discussed in detail.

<sup>3</sup> *The Code of Canon Law: A Text and Commentary* (The Office of Sanctifying in the Church), Canon 1243.

<sup>4</sup> Ibid.

<sup>5</sup> The emphasis on local autonomy was affirmed by Mr. Frank Villaronga, of the Archdiocese of Miami, with whom I read relevant Canon Law on October 15, 1998. In response to an

for the faithful departed and properly blessed. If, however, this cannot be achieved, individual graves are to be properly blessed as often as possible.”<sup>6</sup> These Catholic cemeteries may be established by a local authority (diocese or archdiocese), by an individual parish, or even by an individual family.<sup>7</sup>

The Associated Catholic Cemeteries’ rules governing designs and inscriptions on markers and monuments are intended for a Catholic cemetery, but are applicable for all Catholics. Designs must “perpetuate Catholic ideals” and “No anti-Christian symbols, and particularly, no anti-Catholic symbols will be allowed.”<sup>8</sup>

The Church’s recommendations for memorials in specifically Catholic cemeteries as found in *The Catholic Cemetery—A Vision for the Millennium* include the following principles:<sup>9</sup>

1. “Every person buried in a Catholic cemetery is entitled to some type of memorialization.”
2. “Every Catholic cemetery needs clearly defined rules and regulations relative to the type of material, size, design, inscription and installations of memorials.”
3. “Memorials are an important part of fostering the community’s awareness of the sacred. A memorial keeps remembrance alive. It commemorates. In a Catholic cemetery, it is lasting evidence and a reminder of a Christian life lived.”
4. “Memorials must not offend religious proprieties, Church discipline or good taste. Because different cultural and ethnic groups in our society have various styles of faith expression, one cannot demand adherence to any universal form of memorialization that may serve to limit this expression, including recognition of an individual’s life work, avocation or pursuit.”
5. “Memorialization has great significance for the survivors of the deceased. For the Catholic, this significance is enhanced by the prescription that each Catholic memorial bear a Christian Cross in its design.”

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e-mail query, Mr. Richard Peterson, Director of Cemeteries of the Archdiocese of Seattle, wrote on September 23, 1998, in confirmation of Mr. Villaronga’s assertion: “[E]ach diocese is independent of the others all united with the pope. Obviously, there are matters of faith and morals which are universal as well as Church laws, but practical implementation at the local level for items like operations of the Catholic cemeteries rests with the local bishop.”

<sup>6</sup> Canon 1240.

<sup>7</sup> Canon 1241.

<sup>8</sup> *Associated Catholic Cemeteries Memorial Policy* (revised January 1, 1998); cited by Richard Peterson, Director of Cemeteries of the Archdiocese of Seattle, in an e-mail dated September 23, 1998.

<sup>9</sup> *The Catholic Cemetery—A Vision for the Millennium* (National Catholic Cemetery Conference, 1997). These citations were provided by Mr. Peterson, with the very important stipulation that “This book sets forth a vision but does not establish policy, directives, or mandates” (Peterson, September 23, 1998).

## APPENDIX B

The manager of Miami's Our Lady of Mercy Catholic Cemetery, Mr. Jack Averell, confirmed these principles, succinctly stating that the only requirement is that at least one Christian emblem be incorporated into a marker or monument, and that the only prohibition is the avoidance of symbols or sayings "contrary to Church teachings."<sup>10</sup>

When viewing these recommendations (not formal requirements) alongside the City of Boca Raton's Municipal Cemetery's regulations, it is obvious that standards #1, #2, #3, and #5 are fulfilled. Only #4 might be an issue; however, these recommendations were intended for specifically Catholic cemeteries, where faithful Catholics are recommended for burial, and not to public or municipal cemeteries. I shall address some of the implications of this point below, in a section titled "High Traditions and Little Traditions."

### PROTESTANTS

Protestant requirements for markers and monuments are essentially the same as those for Catholics, although less formalized or codified. Like the Catholics, the Protestant's grave may be honored with Christian symbols and must avoid pagan or anti-Christian symbols. As is the case with Catholicism, we could find no directive or regulation preferring a monument over a marker. The three basic principles (1) respect for the dead (2) testimony to the deceased's commitment to a Christian life, and (3) good taste govern the Protestant view.

### JUDAISM

The first requirement for Judaic burial is that it take place in an area consecrated for this purpose. This may be either a Jewish cemetery or a Jewish section of a larger, often municipal, cemetery. In the latter case, the Jewish section of the cemetery should be fenced off from the larger areas for gentile use.<sup>11</sup> At the Boca Raton Municipal Cemetery there was one area of 150 graves which had been purchased by Temple Beth-El, but it was not marked off by a fence. Curiously, the grave of the Jewish litigants' deceased family member was outside of the Jewish (Temple Beth-El) section.<sup>12</sup>

According to Judaic tradition, a marker or monument serves three purposes:

"To mark the place of burial, so that priests may avoid defilement from the dead—a ritual impurity that the Bible prohibits. For this purpose only a simple marker would be required."

"To designate the grave properly, so that friends and relatives may visit it. For this, what is required is only the name of the individual on a modest stone."

<sup>10</sup> Jack Averell, cemetery manager, Our Lady of Mercy Catholic Cemetery, Miami, telephone interview, October 7, 1998.

<sup>11</sup> Rabbi Maurice Lamm, *The Jewish Way in Death and Mourning*, p. 68.

<sup>12</sup> Visit to Boca Raton Municipal Cemetery, October 23, 1998.

"To serve as a symbol of honor for the deceased buried beneath it. For this purpose one should erect as respectable a monument as the heirs can afford, avoiding unnecessary ostentation."<sup>13</sup>

Point #1 above may be unfamiliar to many people. The hereditary priests of Judaism (*kohanim* [pl.]; sing. *kohen*) must avoid becoming defiled by close proximity to a corpse. In particular, the *kohen* must avoid walking upon a Jew's grave. For this purpose, some rabbinic authorities recommend that both the "top" (i.e. the head) and the "bottom" (i.e. the foot) of the grave be marked. While not specifically stated in the *Rule and Regulations of the Boca Raton Municipal Cemetery and Mausoleum*,<sup>14</sup> I was told by Mr. Harris that foot markers in addition to head markers are permitted.<sup>15</sup> Given this information, even the stricter Judaic interpretation of point #1 is permitted by the cemetery's rules and regulations, although simply a head marker is sufficient according to most authorities.

As for whether a marker or monument is required, "Good taste, quiet dignity, and the avoidance of ostentation are the only guidelines for selecting the monument."<sup>16</sup> And "Styles of monuments vary. The particular shape is of no consequence to the tradition."<sup>17</sup> The marker or monument should contain such information as: the Hebrew name of the deceased, his/her father's name (and for some, mother's name), the English name of the deceased, and the Hebrew and English dates of birth and death. It is also customary to include a symbol to indicate the deceased's Judaic status: a pair of hands for a *kohen*, a water pitcher for a *levi*, and some other Judaic symbol, such as a menorah or the two tablets, for *yisrael*.<sup>18</sup>

Double monuments, usually for husband and wife, are a fairly common Jewish funeral practice,<sup>19</sup> and as the Boca Raton Municipal Cemetery allows for double markers,<sup>20</sup> there is no conflict. However this Jewish custom does not have the force of law; it is not a requirement but a custom.

Point #3 above might raise some questions regarding the Boca Raton Municipal Cemetery's rules, as might the requirement that the marker "be a clear, visible demarcation of the gravesite."<sup>21</sup> Our discussion of "High Traditions and Little Traditions" (below) will address some of the ramifications of point #3.

Rabbi Lamm, an eminent authority on all matters pertaining to Judaic laws governing death, bereavement, mourning, and burial, has addressed the question of markers specifically: "While the form of the marker is of little religious signif-

<sup>13</sup> Rabbi Maurice Lamm, *The Jewish Way in Death and Mourning*, p. 188.

<sup>14</sup> Rules and Regulations of the Boca Raton Municipal Cemetery and Mausoleum, Section XIV, "Memorials, Monuments and Markers," page 13.

<sup>15</sup> Curtis L. Harris, interview, October 23, 1998.

<sup>16</sup> Rabbi Maurice Lamm, *The Jewish Way in Death and Mourning*, p. 191.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., pp. 191-192.

<sup>19</sup> Ibid., p. 189.

<sup>20</sup> Curtis L. Harris, interview, October 23, 1998.

<sup>21</sup> Rabbi Maurice Lamm, *The Jewish Way in Death and Mourning*, p. 189.

## APPENDIX B

icance, what is important is that there be a clear, visible demarcation of the gravesite. For example, there are cemeteries that utilize small, flat stones that are flush with the earth, and it is difficult to determine whether they are footstones or headstones. These are not generally desirable, unless the whole outline of the grave is clearly evident. If only footstones are permitted by the cemetery, they may be used and the small size is not considered a belittling of the deceased."<sup>22</sup>

### MUSLIM

Muslim traditions regarding markers and monuments are also rather minimal. According to Imam Nitham H. Hasan,<sup>23</sup> Islamic markers should be inscribed only with the name of the deceased and his/her dates of birth and death. In particular, verses from al-Qur'an are not to be inscribed because the markers are walked and sat upon, and this would be disrespectful and unbefitting religious symbols or holy verses, according to the Imam.

### "HIGH TRADITIONS AND LITTLE TRADITIONS"

Scholars of religious studies often make a distinction between "high traditions" and "little traditions," a distinction which might prove useful for the current discussion.

By "high tradition" is meant to [*sic*] textual-legal side of a religion, usually male dominated and church or synagogue-centered. By "little tradition" is meant the folkways and home-centered observances, usually orally rather than textually transmitted, often the domain of women in a traditional culture.

Another way of making this distinction would be by using the concepts of "by law" and "by custom."

In contemporary America, the "little traditions": are often based in ethnicity, and one can make a distinction between practices which are "religious" and customs which are "ethnic," the "high" and "low" traditions.

For example, point #4 in our discussion in our discussion of Catholicism above held that "Because different cultural and ethnic groups in our society have various styles of faith expression, one cannot demand adherence to any universal form of memorialization that may serve to limit this expression, including recognition of an individual's life work, avocation or pursuit."

Indeed, the ethnicity of the deceased often plays a role in decoration of the Christian monument. Ukrainian markers often depict the domed churches of the Orthodox Church. Depictions of Christ and Mary are also common.<sup>24</sup> Ital-

<sup>22</sup> Ibid.

<sup>23</sup> Nitham H. Hasan, spiritual leader of the Islamic Center of South Florida, Pompano Beach, telephone interview, October 3, 1998.

<sup>24</sup> Thomas E. Graves, "Keeping Ukraine Alove though Death: Ukranian-American Grave-stones As Cultural Markers," *Ethnicity and the American Cemetery*, ed. by Richard E. Meyer (Bowling Green, OH: Bowling Green State University Press, 1993), p. 67-69.

ian and Mexican Catholic markers often portray images of Mary or Christ or local patron saints. Small shrines or reliquaries on Mexican monuments may include "An effigy of the Virgin, a tiny crucifix, a candle, or some icon." A distinctive feature of the Mexican headstone is the bright a [*sic*] festive colors of the markers. Colorful objects such as marbles, charms, and plastic crucifixes, are often pressed into the wet cement of a marker. Individuality and conviviality are favored. "Death, with its Germanic blacks and purples, finds no suggestion in the gaily painted Mexican memorials and abundant flowers."<sup>25</sup>

Similarly among Jews, the style of the marker or monument is dictated by ethnic custom rather than by religious requirement. For example, Sephardim prefer a monument placed horizontally over the grave, while the Ashkenazi custom is a vertical monument.<sup>26</sup>

"Little tradition" customs are no where codified; indeed, by their nature they are oral rather than textual, and as such run the risk of being idiosyncratic. No one could judge the "authenticity" of a little tradition practice; whatever an individual happens to feel could be argued to be a "little tradition." Very often, sincerely and passionately held religious beliefs turn out to be held only on an individual basis, with no source in the religious high tradition itself. If we accept all "little tradition" customs as valid and binding in the same way that "high tradition" laws and doctrines are, then we run the danger of falling into a relativism bordering on anarchy.

As we are considering religions with vigorous high traditions—Catholicism, Protestantism, Judaism and Islam—we have clear guidelines as to what are and what are not acceptable ways of marking the graves of the deceased. And there is nothing in the *Rules and Regulations of the Boca Raton Municipal Cemetery and Mausoleum* which interferes with the exercise of these religions as defined by their high traditions.

## CONCLUSIONS

This research about grave markers and memorial leads to several observations and generalizations. The modern trend in grave monuments for all religions is the in-ground plaque or marker, which requires minimal care and maintenance. Bronze is the typical metal used for these markers, and a granite or marble base may be used to add height and definition to the marker. The symbols which adorn traditional monuments are available for decoration of the markers.

According to some scholars, these markers represent a changing attitude among Americans towards death. The new ideal is "reconciliation with the natural environment." Traditional monuments, on the other hand, stressed the individuality of the deceased and tended to "elicit the very sense of the continued presence of the dead that the landscaped cemetery by design is meant to

<sup>25</sup> Terry G. Jordan, *Texas Graveyards: A Cultural Legacy* (Austin, University of Texas Press, 1982), p. 53.

<sup>26</sup> *The Encyclopaedia of Judaism* (1989 edition), p. 154, s.v. "Cemetery."

suppress.”<sup>27</sup> As death is relegated to the further reaches of American consciousness, the individuality of monuments is being discouraged. Uniformity is becoming the norm. Scholars view the emphasis on public or municipal, or in some cases privately-owned, commercial cemeteries, as shifting the responsibility of caring for the dead away from the community, its churches and synagogues, and thereby away from public awareness. What Roberta Halporn wrote about Jewish cemeteries holds true in general: “[I]n more contemporary Jewish cemeteries one can now view acres of stones, bearing little more design than [*sic*] the name of the deceased and the death date.”<sup>28</sup>

## THE AUTHOR OF THIS REPORT

This report was prepared by Nathan Katz, Ph.D., professor and chair of the Department of Religious Studies at Florida International University. Dr. Katz is an expert in the history of religions, comparative religions, the religions of South Asia, and Judaism. He has published a dozen books and more than one hundred scholarly and popular articles, has lectured at leading universities across North America as well as in Europe and Asia. Among his awards are four Fullbright grants. He was named the scholar-of-the-year in 1990 when he was on the faculty of the University of South Florida, and for six consecutive years has been selected by the Florida Humanities Council to lead seminars for teachers. He has submitted a copy of his complete curriculum vita.

Dr. Katz was compensated at the rate of \$200/hour. This is the first time he has served as an expert witness.

Curriculum Vitae: [original c.v. was forty pages; Professor Katz has published over forty books and written over fifty articles; original has been edited by author for this appendix]

Nathan Katz

### EDUCATION

Ph.D.	1978	Temple University	Religion
M.A.	1975	Temple University	Religion
A.B.	1970	Temple University	English

<sup>27</sup> John Matturi, “Windows in the Garden: Italian-American Memorialization and the American Cemetery,” *Ethnicity and the American Cemetery*, ed. by Richard E. Meyer (Bowling Green, OH: Bowling Green State University Press, 1993), p. 23.

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## ACADEMIC APPOINTMENTS

- 1994– Florida International University, Professor of Religious Studies  
 1984–94 University of South Florida Professor of Religious Studies  
 1979–84 Williams College, Assistant Professor of Religion  
 1978–79 Naropa Institute, Core Faculty in Buddhist Studies

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# REPORT OF REVD. PROF. JOHN ANTHONY MCGUCKIN CASE OF WARNER ET AL. VS. CITY OF BOCA RATON FLORIDA.

This report has been prepared by :  
Rev. Dr. John Anthony McGuckin.  
Professor of Early Church History,  
Union Theological Seminary, New York.

Professor McGuckin is a Theologian-Priest of the Eastern Orthodox Church in addition to his role as academic teacher and scholar in a graduate school of higher research in the City of New York.  
He is a Fellow of the British Royal Historical Society.

A list of his professional qualifications, and of his academic writings, is attached to this report in the form of a *Curriculum Vitae*, and a *Bibliography of Published Work*.

Prof. McGuckin has not previously appeared in any legal case in the United States to give expert testimony.

*Report:**A. Introduction and Synopsis of Opinion.*

I have studied the rules and regulations of Boca Raton Cemetery, with a view to the specific question that was posed to me: how would I formulate an opinion on these rules, and their implications in relation to the expression of basic Christian religious belief in burial practice. I will try to distinguish (a) what might be regarded as 'fundamental' Christian attitudes (such as arise from the ancient Christian tradition as can be witnessed in burial praxis over past centuries which continues in to the present century in many living forms of Christian religious traditions) and (b) what could legitimately be regarded as 'genuine religious sentiment' based within the spiritual traditions of Christian religion but which are more personal in character, related to the individual only.

From that point of consideration let me state my overall belief at the outset: The rules and regulations of Boca Raton cemetery, forbidding anything but a flat memorial stone, seem to me to represent a distinctly secularized and hyper-individualized consciousness that appears to presume a view of death, and the dead body, as spent commodity, and of the grave as a place where only temporary remembrance of immediate family members needs to be preserved. The widespread pervasiveness of such a view in modern American society should not be taken as a standard norm from which to assess how basic Christian tenets (that is Christian religious views of death, afterlife and burial practice) ought to be applied in the concrete, even though many Christian persons will, of course, be influenced by such a consciousness to the extent of adopting and conforming, without protest, to the generic forms of burial custom of the surrounding society. In this light I can foresee that many Christian religious persons might have no objection to the regulations of Boca Raton Cemetery, while others would have fundamental religious objections to them if they were to be enforced in their cases—to the point that, in my opinion, this enforcement would represent a definite invasion of such people's fundamental religious beliefs. Popular graveside practices, rising out of Christian belief-systems about death, burial and mourning rituals, which I think the Boca Raton Cemetery regulations seek to restrict, could be shown to be those of the majority of the mainstream of the Christian Church which has developed basic forms of religious praxis through its approach to central life-events (such as marriage, births, deaths) for long centuries, in the process creating a widespread Christian consciousness, and set of expectations, over such things. In relation to death practices, the patterns of Christian behaviour witnessed over centuries accumulate in the individual Christian's consciousness (even when, as is often the case, ordinary Christian people might not be able to articulate these beliefs theologically) and so become an encultured pattern of belief. This pattern in the form of historical 'catholic' Christianity (a term that embraces many varieties of the Christian religion such as the Roman Catholic, the Eastern Orthodox, the Episcopalian, the Methodist, and the Presbyterian, among others) is called the 'Tradition of the Faith'. It is not something that is primarily represented in ecclesiastical law books, though partially it can be witnessed there;

nor is it something that is represented only in Scriptural passages considered as 'proof texts,' or in formal decisions made by Church leaders. The Christian Tradition is something that the whole body of Christians represents<sup>1</sup> through its long continued practice through the centuries, but especially in regard to practices that are allied with, and meant to protect (even as they express them) the fundamental beliefs of the Religion. To interfere with the right of Christians to express their belief through the customary popular rituals (in this case I consider only the rituals of burial, and mourning) does, in my opinion, represent a genuine curtailment of fundamental religious freedoms.

The opinion is one that needs to be substantiated and explained by some reference to Christianity's theological attitude to the dead body and to the grave, and also to the expectation of the bereaved family members in regard to the dead person—the forms and rituals of mourning that are observed (both formal liturgies, and personal rituals of remembrance stemming from the sense of reverence towards the dead that is deeply encultured in the Christian religion). It is in regard to the last point that the issue of religious belief intersects with the particular matter of the form of gravestones and the manner in which mourning rituals are observed at the graveside—families expressing grief, intercessory prayer, and penitential supplication to God, at the actual site of the grave. In my opinion the restrictive rules of the Boca Raton Cemetery in regard to grave marking represent not a neutral or reasonable view about death and humankind, but one that could even be seen as inimical to the expression of Christian philosophy and the praxis that follows from it.

I would like to offer some background in support of this viewpoint, as to why the practice of erecting a standing Cross, or a religious statue (of Christ, the Virgin Mary, an Angel or a Saint) can be claimed, objectively, as a matter relating to fundamental religious expression of belief. I would like to do so by first of all discussing some doctrinal-theological attitudes of Christianity (Section B); secondly by giving a few selected examples from historical practice (in so far as they demonstrate a deep-seated Christian attitude to this issue which makes it irreducible to merely contemporary custom) (section C); and lastly by considering the particular issues of standing grave-markers and grave edgings raised by the Boca City regulations, in terms of the question: do they impinge upon an 'objective' Christian religious sensibility, or upon a 'subjective' religious sense of the families involved? (section D)

### *B. Christian-Theological Grounds for This Opinion*

The de-sacralisation of the concepts of space (holy place) and person (sanctified presence) have been one of the results of late modern developments in many parts of the Western world, but the older, and mainstream, beliefs of Christian consciousness have maintained quite a different approach, and this is represented still in a lively way in the fundamental expressions of liturgy and prayer

<sup>1</sup> A point I have more fully elaborated, with historical examples in my article: *The Concept of Living Tradition in Orthodox Theology*. St. Vladimir's Theological Quarterly. Winter. 1998.

rituals in the churches. To this extent I take what the liturgical services and prayers represent to be a central part of religious belief and praxis, certainly for Catholic and Eastern Orthodox Christians, and also for those reformed traditions whose liturgies of burial I have witnessed: Episcopalian, Lutheran and Presbyterian. [Much of what I have to say about the sacredness of the grave as space, and the sanctity of the dead person awaiting the Judgement applies equally to Jewish religious belief—though I will not develop that here.<sup>2</sup>]

The classical Christian understanding of burial devolves from the central Christian doctrine that the human person is the Image and Likeness of the Divinity. It is closely related to the prior doctrine, which underpins it, of the Relation of Jesus Christ as the incarnation (appearance within embodied flesh) of the Godhead. The fundamental sanctification of the Church which results from the incarnation and saving acts of Jesus is a tenet which underlies all central forms of Christian faith.<sup>3</sup> The Christian is seen to be redeemed, sanctified, elected—whatever terms are used. In the burial rituals of the Catholic and Orthodox churches, the emphasis turns on the committal of the dead person to sanctified ground. The Eastern liturgy uses a recurring phrase in the burial services, and in memorials for the dead, a phrase that is a verse from the psalms and used with explicit reference to the dead body: 'The Earth is the Lord's, and all those who *dwell within it*.' Much of the Catholic burial service turns around the notions of honouring the dead body as a sacred thing, and of consecrating the gravesite as a hallowed place. The idea of 'consecration' of the Cemetery is far more, in the Christian consciousness, than the mere dedication or setting apart of land, by a secular agency, for the purposes of burial of bodies: rather, it connotes this fundamental sense of the hallowing or making-sacred of ground for the purpose of receiving the body, and for the purpose of serving as a place of sober reflection and grieving prayer for those who visit the place thereafter. The old Christian rituals of consecration (still used in Roman Catholic, Episcopalian and Orthodox practice wherever the land used belongs entirely to the respective churches) stress this element of the graveyard itself becoming a place of prayer to teach the living how to prepare for their own deaths, as well as a place where they can pray for their dead.

In earlier Christian civilisations the entire cemetery (a word that Christians invented: *koimeteria*—meaning a place of sleeping under the eye of God until the last Day) would have been consecrated in a formal rite as holy ground, in order to keep safe the holy bodies of the 'images of God' who were destined to rest there until the time of God's Judgement on human history.<sup>4</sup> Christian belief has never accepted the view that human persons were 'souls' trapped temporarily in a body, but has, rather, taught as a basic foundational doctrine, that human persons as 'embodied souls' are the image and likeness of God. The aspect of image, in other words, also involves the aspect of embodiment: be it as alive, or dead—waiting for the Word of God.<sup>5</sup> As such, the Resurrection of the

<sup>2</sup> For further elaboration of this point of a classic discussion of the theme in Bender (1893–4).

<sup>3</sup> cf. Burghardt (1957).

<sup>4</sup> Di Berardomp (1992); Grabar (1946).

<sup>5</sup> Cullmann (1958).

## APPENDIX B

Body is a fundamental tenet of Christianity (reflected in all the early creeds of Christendom), and the need for sanctified ground in which to lay that body is a common and important part of Christian practice from earliest times. If the church cannot own and consecrate ground for the purpose, it is customary in Catholic and Orthodox practice, for the priest at the burial service to consecrate the actual grave that is being used. The ground itself, as well as the body which is blessed and incensed, in several forms of burial service, is regarded as something mysterious and deserving of reverence.

It is widely expected in many major forms of Christianity (less noted in modern protestant religious consciousness than in catholic forms of Christianity), that the families will pray for their dead, as well as grieve for them, at the site of the grave, as well as in their churches and homes. In the Eastern Orthodox Christian liturgy, as also in Catholic practice in many parts of the world, it is a regular part of church life for the parish to meet in the graveyards and conduct services there on a regular basis—not just at the time of burial. The place is felt to be important. The grave becomes a place of prayer. The sites of the graves of ancient (and modern) Christians who had an especial reputation for holiness have often become places of pilgrimage, and churches have been built over them in due course. This was the origin of so many ancient churches—which were built over the grave-sites of the earliest martyrs of Christianity (and was the original reason why many Christian churches to this day bear dedications of saints' names).

### *C. An Historical Background to Christian Burial Rituals*

I will not make here a whole series of historical notes on what is a very large body of data, but I think it important to note that the extremely close connection of the Christian religion with this principle of the reverence for the burial site, and for the sanctity of the dead body which rests in anticipation of the resurrection, is something that can be witnessed from the earliest origins of Christian religion as a distinctive aspect of that religion.<sup>6</sup> The Catacombs in Rome are among the most important of all archaeological sites for giving evidence on fundamental matters of Christianity in the immediate post New Testament period.<sup>7</sup> The inscription of Crosses, and the listing of names and synopsis histories (epitaphs) are clearly developed by Christians in their own special ways from the normal burial practices of neighbours around them. Soon, with increasing affluence among the Christian communities, inscribed grave stones become more apparent. These are the first forays into Christian Art and Iconography which soon became a major element of the expression of Christian Faith—and still is within Catholicism and Orthodoxy<sup>8</sup> (although Protestantism generally takes a more iconoclastic<sup>9</sup> position on this—tending to reject imagery, statuary, and iconography from the fundamentals of Christian

<sup>6</sup> Snyder (1958). Toynbee (1971).

<sup>7</sup> Stevenson (1978).

<sup>8</sup> DT Rice (1957). Wulffe (1914). Morey (1942).

<sup>9</sup> Bryer & Herrin (1975).

faith). The Latin Christian poet Prudentius, in the 4thC, gives a whole account of the careful tending of Christian graves and the making of gravestones. His world and in it the erection of the stone and the laying of flowers constitute the fundamental symbolic forms of the ritual.<sup>10</sup> The Greek Christian Poet and theologian Gregory of Nazianzus shows in his writings (c. 387) how the account of the life of the believer ought to be inscribed on a tombstone and set over the place of burial to serve as a focus for the prayer of the believers for that person.<sup>11</sup> This is the specific Christian custom of the Epitaphios serving as an intercessory prayer as well as a grave marker. The earliest 'important' example of Christian Epitaphios is the stone of Bishop Abercius, from the late 2nd century, but the epigraphic remains from Rome and Asia Minor show that this engraving of the sacred sign of the Cross or other devices, was a custom that was almost as ancient as the Christian religion itself.

The more common custom, in later Christian centuries, was for the sacred Cross to be lifted up over the grave site to mark the place of the body and to signify that this was a holy place, the resting place of a Christian. The 'lifting up of the Cross' was a ritual form that paralleled liturgical services of the Cross, and which used the 'elevation' to symbolise, almost sacramentally, the victory over death won by the crucified Saviour. This remains the standard form of ritual Christian grave-practice in many parts of the world to this day, although the custom of inscribing an Epitaphios on the gravestone (a synopsis of life) often led to the preference for a standing gravestone as well as, or in place of, the Cross. Reformed Christianity began in later centuries to prefer the standing gravestone. Orthodox practice preferred the Cross (and now it is regarded as a part of the religious duty of the family to raise a Cross over the site of the grave). Roman Catholic practice often combined several variations on this theme: the Epitaphios is sometimes written on a Cross, and sometimes written on a stone, with a statue of the Christ-Lord, or an Angel, or the Virgin Mary, serving the same role as a Cross: to mark and bless the site of the grave.

The pagan emperor Julian, in the 4th Century, criticised the Christians for making churches into 'charnel houses', and many who approach the issue from a rationalist frame of reference may regard this reverential attitude to the dead as something bizarre, or fixated. However, I think that it is a fundamental expression of the communion of love which serves as the basic 'Constitution' of the Christian Church (what the creeds call the 'Communion of the Saints' and define as one of the fundamental characters of Christianity.<sup>12</sup>)

The late modern period (18thC onwards) has seen a massive movement of desacralisation across western societies in general. The concept of sacred place and sacred thing (including the sacred ground of graveyards, and the sacred 'vessels' of the dead Christians' bodies) has become a notion that the late mod-

<sup>10</sup> Waddell. (1975).

<sup>11</sup> Paton (1919).

<sup>12</sup> The Nicene Creed expresses it by placing three fundamental 'attitudes' together as deeply related: 'I believe in . . . the communion of saints, the forgiveness of sins, the resurrection of the dead.'

ern mind does not much consider. The late modern existential attitude, as I said earlier, might be described as dominated by the idea of persons and bodies as dispensable commodities; as such it conflicts with Christianity on several fronts, which is, of course, in essence an eschatological religion with a central belief in the sacredness of the person and of the body as a sanctified image of the incarnate Godhead.

#### *D. Objective or Subjective Elements*

If we consider to what extent is it reasonable, or 'mainstream', for a Christian to have a desire to mark the grave of a member of their natural, and Christian, family (for the relative is not just a 'natural' relation, but bonded to them by religious ties and obligations too) then I would say that it is a fundamental part of Christian religious practice. Regulations that forbid a Christian family to erect a standing Cross, or even a standing stone Epitaphios contradict an ancient Christian practice, and do an objective violence to fundamental religious attitudes to those Christians who retain the classical 'catholic' sense of this theology of death and grieving observance.

If I was to consider: would it be a useful compromise to have a flat stone embedded in the cemetery grass, as opposed to a standing stone, I would respond that the Orthodox Christian church, at least, would regard this as sacrilegious: for the Cross ought to be over the grave—and the sacred sign of the Cross must never be placed in a position where it could be walked over. The canons of the eastern church have forbidden this since the time when Islam made walking on the Cross a way in which Greeks under the Ottoman domination were led to renounce their faith. In other forms of catholic practice the flat stone marked with a Cross is deemed not to be sacrilegious, and to many it has become a modern form of practice. Those who still find it objectionable have the historical precedent behind them: that this modern form cannot be regarded as fulfilling the religious task of 'raising the Cross' over the grave; in practical terms it is not sufficiently visible, and in religious terms it cannot represent the ritual of the 'raising of the Cross' (a liturgical aspect of catholic Christianity in the churches—which denotes the 'victory' of Christ over death) over the gravesite because of its very nature as a supine symbol. I regard the issue of religious statues of Christ, the Virgin, or a Saint as a modern form of western catholic practice paralleling the ritual of the elevation of a Cross. In this instance the statue is meant to stand over the head of the grave as a protective symbol: a religious statement which would also be wholly vitiated by a supine two-dimensional image.

I have also been made aware how some wish to construct little walls or ledges around the actual site of the grave. This is a custom in keeping with Christian sensibility, though in my opinion not a mainstream issue in the way the previous ritual of grave-marking is. The desire for the small grave edging reflects the same attitude of the sacredness of space, to which I have alluded to earlier, though it does not, of course, ensure the hoped-for result of separating off the 'sacred space' from people who might walk over it. In a more widely Christianised civilisation, as evidenced by common practice in earlier times,

and even by the strict protocol in many Christian countries to this day, no-one would ever dream of walking over a grave, but many bereaved people today (and probably with good reason) fear this sense of de-sacralisation around them, and wish to express their reverence in this way. I would think, personally, that the forbidding of the grave edgings does not impinge 'objectively' on their fundamental Christian beliefs, or the expression of them, but does impinge on a reasonable religious attitude on their part that has been fostered by mainstream Christian traditions in many times past, and to this extent the forbidding of this custom of edging-markers could be said to conflict 'subjectively' with sincerely held religious views, by suppressing them.

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### EXPERT REPORT OF DANIEL PALS

*Warner vs. City of Boca Raton*

Submitted by

Daniel L. Pals, Ph.D.

This report, requested by the defendant, addresses issues raised in the pending class-action complaint brought by Richard and Miriam Warner, et al. against the City of Boca Raton, Florida. Its purpose is to offer an instructive commentary on religious traditions and practices that underlie the dispute. The discussion opens with a brief introductory statement on the issues that are considered by the defendant to be central to this case, which turns in large measure on attitudes toward the dead and the role of burial markers or monuments in religious practice. It then offers a review primarily of Jewish and Christian tra-

ditions that bear on the matters of death, burial, and memorials for the dead. Finally, both in the course of the discussion and in concluding remarks, it attempts to enter an informed professional judgment on the application of these traditions to the issues that will need resolution under the law.

## I. THE DEFENDANT'S POSITION ON THE LAW

It is clear from the Complaint that the plaintiffs allege violations of several state statutes and federal constitutional provisions that bear on such matters as the free exercise of religion, freedom of speech, and due process of law. In correspondence received prior to the preparation of this report, Counsel for the City has explained that while most of these allegations appear to be without merit, the one possibly significant claim is that which is brought under a Florida statute that has become effective in recent months: the State of Florida's Religious Freedom Restoration Act of 1998 (hereafter RFRA). Accordingly, the assessment presented here confines itself specifically to this statute, the relevant portion of which claims the following:

The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: Is in furtherance of a compelling governmental interest; and Is the least restrictive means of furthering the compelling governmental interest.

With regard to this article of the RFRA, two initial observations would seem to be in order:

1. It would appear that the City has plausible grounds to mount a first defense of its action under the provision for exception allowed by this statute. The City administration can reasonably claim a compelling interest in the efficient and economical administration of properties entrusted to its care, and a policy which allows a certain kind of grave marker, but not those found to be obstructive, is as minimally restrictive a policy as one can imagine, given the need for continuous access and maintenance. Hence a burden on the religious exercise of some, even if substantial, might reasonably be borne by those who are directly affected in order to maintain in good order a property which as civic land belongs to all.

2. Setting aside the clause of exception, and attending to the article itself, the central and obvious question is this: Do the City's restrictions on memorials or monuments constitute a substantial burden on the exercise of religion by those persons who choose to make use of its public cemetery? In answering, we should note that in the statute as written, the crucial term of decision is not "burden," but "substantial." All can agree that the state has the right to place some burdens on the exercise of religion. Churches, temples, and synagogues are no more free than any other organization, or individual citizen, to

flout traffic laws, ignore zoning ordinances, or disregard basic safety regulations merely because they might claim to be doing so in the name of religion. To the extent that they accede to such laws on occasions when mere convenience or optional religious preference would lead them to do otherwise, religious organizations and individuals plainly accept certain burdens of citizenship placed upon them by the state. Under the RFRA, it is only when these burdens become "substantial" that the issue of religious exercise becomes a relevant consideration. For example, if a city or state were to disregard completely both Biblical precedent and unbroken orthodox tradition and move to the closure of Christian Churches on Sundays, clearly that action would subject practicing Christians to a substantial burden. It would impose directly on free religious exercise. The same would apply in the case of Judaism if all synagogues and temples were ordered closed each week from Friday to the following Saturday evening. In both the Jewish and Christian instances, while certain modest burdens can be borne as reasonably within the rights of the state to impose, these substantial burdens could not be. Needless to say, then, appropriate application of the Florida law in this case will depend on what the court decides to be a truly substantial burden upon a person's exercise of religion. Do the City's restrictions on burial monuments fall into a category nearer to that of modest and natural burdens, such as traffic laws and zoning ordinances? Or do they take a place alongside a law (here hypothetical, of course) mandating the closure of houses of worship on their historic and traditional days of assembly? This report contends that the City's ordinances pertaining to its cemetery clearly belong to the former, not the latter category. That they are "burdens" of a sort is undeniable, as is the fact they are perceived by certain religious persons as inconvenient or personally disconcerting. That they rise to the level of a "substantial" burden upon any Jew or Christian is a much stronger claim. It is a proposition that, in my professional judgment, the relevant evidence from the religious traditions cannot be read to support. Before turning to this evidence, however, some comment needs to be made on the criteria for assessing it.

## II. DETERMINING "SUBSTANTIAL BURDEN:" ESSENTIAL AND INTEGRAL VS. MARGINAL OR TANGENTIAL CUSTOM

In the extreme examples cited above, it is not hard to see which restrictive actions of the state impose substantial burdens and which do not. But not all cases are so clear cut. What is needed for a clear grasp of the issue is a general and guiding principle by which to distinguish "substantial" burdens from those that are insubstantial—what I have earlier called "modest and natural." The only way to deduce such a principle is, for any given practice or custom, to examine it in context, so as to determine where it stands in the religious tradition that houses it. To the degree that a given practice or custom is judged to be marginal or tangential—that is, a matter either of irrelevance, general indifference, or

merely personal preference—within a religious community, it is hard to see how a restriction upon it can be construed as a burden that is in any meaningful way substantial. If a church prefers angle parking at Sunday worship, and a civic ordinance requires parallel, that ordinance is a burden, but it can hardly be construed as substantial. Parking practice is marginal at best to the concerns of religious practice. On the other hand, to the degree that a given practice or custom is integral and essential to a tradition, a restriction upon it is much more likely to constitute a substantial burden. A restriction on worship that permitted sermons and homilies while it prohibited rituals and sacraments would be regarded by churches, quite rightly, as an unlawful state imposition. Most every religion in the world regards a sacrament or ritual of some sort to be integral and essential to its practice. The applicable principle in the matter of “substantial burden” thus comes to be the role, or place, of a practice or custom in a religious tradition, is it essential? Or marginal? Is it integral? Or tangential—that is, largely a matter of indifference or optional preference within the tradition?

Given this general principle, we need to state some criteria for its application. How do we determine what is—and what is not—integral and essential to a religious tradition? Religions like Judaism and Christianity are notoriously large and complicated entities, which change through history and are known at given moments to exhibit remarkable diversity. The determination of what is essential and integral is not likely to be a simple task. Nonetheless, in the case of any given practice or custom, we can make a reasonable determination by posing four main questions: 1) Is it asserted or implied in relatively unambiguous terms by an authoritative sacred text? 2) Is it clearly and consistently affirmed in classic formulations of doctrine and practice? 3) Has it been observed continuously, or nearly so, throughout the history of the tradition? 4) Is it consistently practiced everywhere, or almost such, in the tradition as we meet it most recent times? To the degree that a custom or practice possesses all of the characteristics stipulated in these questions, it can be said to qualify decidedly as essential and integral. To the degree that it displays none, it clearly would have to be designated as marginal or tangential. To the degree that it meets some of the qualifications and not others, it will fall somewhere on a line between the one extreme and the other, its position being determined by the number of the four relevant areas in which it qualifies and the relative weight accorded to each.

### III. DEATH, BURIAL, AND BURIAL MARKERS IN JUDAISM AND CHRISTIANITY: A REVIEW

With the criteria above in mind, we can undertake a review of both the Jewish and Christian traditions pertaining to beliefs about death, grave sites, and vertical burial monuments or markers.

*Judaism*

Is the placement of vertical tombstones asserted or implied in reasonably unambiguous terms by an authoritative sacred text?

The Hebrew scripture (Torah) is virtually silent on the matter of tombstones and memorial monuments for the dead. There is no commandment or prescription on the subject in the moral principles of the decalogue (Exodus 20; Deuteronomy 5). Nor is there anything specific on the issue in the detailed legal material of the Book of Leviticus, where one would expect find to find such a regulation if it were of essential importance to the early Hebrews. In its narrative portions, the Torah records only two noteworthy specific incidents in which monuments or memorials were erected in ancient Israel. The Book of Genesis (35: 20) tells how the Patriarch Jacob placed a pillar (Hebrew: *matsevah*) on the grave of his wife Rachel, and the Book of II Samuel (18:18) reports that Absalom, the rebellious son of King David, built a monument for himself because he had no son to carry on his name. It is not clear that Absalom's monument, which he erected for himself while he was living; was ever intended to be a kind of tombstone, so its relevance as an example is in some doubt. Rachel's pillar, on the other hand, does reasonably qualify as the ancient equivalent of a tombstone but there is no injunctive material associated with it either in the immediate context elsewhere in the Hebrew Bible. Providing a stone is simply something that Jacob did, the text does not command or suggest that anyone else to do the same.

Archaeological evidence indicates that at some point in Biblical times, the custom of marking graves did make an appearance, and it may be that the story of Jacob's pillar for Rebecca offered a useful model for the practice. But about the particular form and character of the monuments we know next to nothing. Other sources from the Biblical era—and in one place the Biblical text itself—suggest that where graves were marked, the purpose was not theological principle, but either momentary expedience or practical necessity of a sort peculiar to the ancient world. For example, an oracle in the Book of Ezekiel (39:15) instructs people who come across a human bone to "set up a sign" by it "till the buriers have buried it." The purpose here is not to place a monument on a grave, obviously, but to mark the location of an object so that it can be buried later. Again, in Judaism of the post-biblical Talmudic era, as in other religions of antiquity, there was commonly a fear of the places where the dead were buried, and graves were often marked out so people, especially priests, would not walk over them and thereby become ritually unclean (Wigoder, p. 708). It is impossible to deduce from the texts, however, that there was anything necessarily permanent or vertically prominent about such markers. On the contrary, at least one text (in the tractate *Shekalim* 1.1) of Mishnah (the instructional material of the Talmud) assumes the opposite. Rather than raise a marker, the surface soil of the grave was simply to be painted white, with markings that were purely seasonal, put in place once a year at Passover for the specifically temporary purpose of warning pilgrims as they passed (Wigoder,

p. 708). Practical considerations seem to have been the main rationale also for a related custom. Biblical and other texts do indicate that stones were sometimes piled at gravesites. But no theological or ceremonial reasons for the practice are indicated. Most likely their purpose was, again, simply to mark the space so passers-by could walk around it, and to keep roving animals from eating the unprotected bodies (Rabinowicz, p. 114). What we find, then, both in the Hebrew Bible and the Biblical era is rather little on the subject beyond a single incident from the patriarchal era, with no prescriptive inferences drawn. Archaeological and other sources suggest only markings that were practical and temporary in nature, with no prescribed, consistent shape or necessarily vertical form. Stone piles, where they appeared, obviously were heaped above the ground, but it is unlikely that more than a few graves enjoyed the luxury of this much protection. There is little to no evidence that markers of some other kind rose vertically above the soil; what evidence we do have beyond the occasional stone pile, suggests quite the opposite: temporary and horizontal markings made directly on the surface of the grave.

Is the placement of tombstones clearly and consistently affirmed in classic formulations of doctrine and practice?

The formulations that have guided Jewish life and thought from the end of the Biblical era to modern times are the classic commentaries of ancient rabbis found [in] the Talmud. In actuality, there are several such collections, the most prominent of which are the Babylonian and Jerusalem Talmuds, assembled roughly between 100 and 500 A.D. Talmudic commentary, though not always consistent, offers little support for the practice of marking a tomb with any permanent vertical monument. Where it can be read as accepting such displays, it understands them to be at best temporary and optional, as is clear in the passage from the Mishnaic tractate in *Shekalim* noted above. A later tractate (2.5) indicates that tombstones are purely optional entities, to be purchased only if there was a surplus remaining from the funds collected for a burial (Wigoder, p. 708). More significantly still, the Jerusalem Talmud (*Shekalim* 2.5), in a statement of pivotal significance to later Jewish thought, records a rabbinical verdict that explicitly forbids tombstones for the graves of the righteous, stating instead that "their deeds are their memorial" (Jacobs, p. 561). It was this important ruling that was codified in the Middle Ages by Judaism's greatest theologian, Moses Maimonides (1135–1204). Maimonides exercised a crucial shaping influence on the whole spectrum of Jewish learning after the 12th century A.D. Without exploring in detail the views of lesser thinkers, many of which simply do not address this subject, we can assume that most would have deferred to Maimonides' authority and example. In the great code of Jewish Law produced by Joseph ben Ephraim Caro (1488–1575), whose influence rivals that of Maimonides, there is a slightly more generous ruling, which nonetheless still concludes that tombstones are in no way obligatory on Jewish graves (Werblowsky, p. 696). Thus the clearest and most prominent voices in the tradition of Jewish theology insist that at best tombstones of any kind (let alone vertical pillars or hills of stone piles) ought not to be mandatory and need not be permanent in nature. They have neither theo-

logical nor ceremonial justification, and have in certain instances actually been discouraged or prohibited, rather than tolerated.

Has the practice of placing tombstones on graves been observed continuously, or nearly so, throughout the history of the tradition?

Comment on this question can be brief, since the residue of nearly 5000 years of history affords little material evidence from burial sites to draw upon, and relatively little extended discussion in texts. Few graves from either the ancient or medieval world remain intact. In the Biblical and Talmudic eras, as we have seen, there is some evidence, both literary and material, of grave sites marked with stone piles and of burials in caves, though whether caves were in any way marked is another point of uncertainty. Even so, as the Biblical New Testament story (John 19:38–42) of the burial of Jesus in a borrowed tomb belonging to Joseph of Arimathea suggests, such special graves and memorials were an option of luxury, available only to the rich or well-placed, and certainly could not pass for the norm. The minute regulations laid down in the Talmud and other Codes for the collection of bones into ossuaries for second burial (Rabinowicz, p. 115) when the original sites became too crowded, also suggests that through the long centuries prior to the modern era, Jewish practice did not differ greatly from Christian (which will be discussed below). The vast majority of those who died may well have been buried at common gravesites, with no enduring individualized marker of any kind.

The first notable departure from this mainstream tradition did not occur until the beginnings of the modern era. In the middle years of the sixteenth century an expatriate from Spain, Isaac Luria (1534–1572), established a community of unorthodox Jewish mystics in Palestine. Luria drew on the occult and unorthodox tradition of folklore, symbolism, numerology, and mystical teachings known well to Jews as cabala (also kabbalah) or mystical “tradition.” Among his other dissenting views, Luria introduced the idea that a tombstone was not an option but a necessity. He went so far as to claim, in opposition to the Talmud and Maimonides, that the tombstone was actually important to the welfare of the deceased (Jacobs, p. 561; Wigoder, p. 708). Despite their unorthodox character, cabalist notions like these exercised a certain underground fascination in the Jewish communities, especially in times of severe oppression (Hopfe, p. 287). Eventually, they found adherents not only in the Sephardic Jewish cultures of Spain and the Middle East, but also in the Ashkenazic communities of Northern and Eastern Europe. It is among these Ashkenazic European Jews that there developed in more recent times a broad tradition of customarily marking the graves of the dead with a tombstone. Since most American Jews are of Ashkenazic background, it is this rather recent tradition that has come to be a fairly common practice in America. Jewish tombstones thus represent a tradition that, while currently practiced in America, is by no means part of an ancient or continuous Jewish heritage (Werblowsky, pp. 695–96).

Is the placement of vertical tombstones consistently practiced everywhere, or almost such, in the tradition as we meet it [in] most recent times?

Jewish custom today varies considerably on the matter of tombstones and gravesite memorials. Most Jews of Ashkenazic heritage do place a vertical

marker of sorts on the grave of a family member at some interval—usually a month or a year—after the burial (Lutske, p. 83). This is not the case, however, with respect to either Sephardic Judaism or Jews in modern Israel. Interestingly, in Israel, the land to which contemporary Jews worldwide look as both inspiration and example, Ashkenazic and Sephardic communities both make almost exclusive use of a horizontal, rather than vertical, tombstone (Werblowsky, p. 696). Beyond this, in Reform Judaism, which has a widespread presence in America, burial itself has become a matter of choice. Cremation, with neither remains nor a public burial site to attend to, is now a not uncommon practice.

In connection with current practice and the rationale for tombstones as currently understood, it is worth citing an authoritative recent work of Jewish burial custom, Maurice Lamm's *The Jewish Way in Death and Mourning* (New York: Jonathan David Publishers, 1975). Lamm (p.188) offers three rationales for the placement of a marker or monument on a grave: Its purposes are: 1) "To mark the place of a burial, so that priest may avoid defilement." 2) "To designate the grave properly, so that friends and relatives may visit it." 3) "To serve as a symbol of honor to the deceased buried beneath it." The first of these principles reaches back to the ancient fear of pollution that threatens any person who treads on a grave, particularly a priest, who is specially consecrated to service of God. Its relevance to the modern cemetery, where those who enter know the location, where walking paths are obvious, and where gravesite[s] are visible, would seem to be marginal at best. The second is simply informative, and can be addressed with markers that are horizontal no less than those which are vertical. And the third is a matter of courtesy and memory, which also can be served by horizontal as well as vertical markers. It is important to notice, finally, that Lamm's entire discussion is placed in a framework not of theological necessity, but of largely optional preference—a matter of both practical convenience and personal courtesy. Lamm's main concern is that there be a "clear, visible, demarcation of the gravesite," and even though he personally does not consider markers that are flush with the earth desirable, he finds them nonetheless acceptable. Most significantly, Lamm clearly states that if only very small markers are permitted by the cemetery rules, then "they may be used and the small size is not considered a belittling of the deceased" (189). Surely, it is significant that this contemporary authority on Jewish mourning, despite a contrary preference of his own, clearly recognizes that at no substantial burden to religious exercise current Jewish custom on this matter can be readily adapted to pertinent cemetery regulations.

### *Christianity*

Is the placement of tombstones asserted or implied in relatively unambiguous terms by an authoritative sacred text?

The authoritative sacred text of Christianity is the Christian Bible, which embraces both the Hebrew Bible (considered above, and called by Christians the Old Testament) and the New Testament. The New Testament consists of three kinds of literature: 1) the four Gospels and the Book of the Acts of the Apostles, the first of which recount primarily the life and teachings of Jesus and

the second of which reports deeds and teaching of his first followers; 2) the Epistles, which claim to offer in the form of letters to Christian communities the advice and teachings from their apostolic founders, most notable of whom was the Apostle Paul, Christianity's first great theologian; and 3) the Book of Revelation, purportedly written by John the Apostle, which in the form of cryptic symbols and oracles claims to disclose what will happen at the end of days.

In none of this literature is the issue of burial monuments or tombstones ever directly addressed. There are occasional passing references to tombs, as when the Gospel of Mark mentions that a man possessed by demons, whom Jesus healed, had "lived among the tombs" (Mark 5: 3). And there are in the gospels three important stories of resurrection miracles which Jesus performs on the dead: the story of the daughter of a man named Jairus (Mark 5:21-43; also found in Luke and Matthew), the story of the son of the widow from the town of Nain (Luke 7:11-17) and the well-known story of the resurrection of Lazarus, the brother of Jesus' close friends Mary and Martha (John 11:1-57). In the first two of these, the daughter and son are recently deceased, so the issue of a grave or gravestone does not arise. In the third, it is stated that the tomb was a cave, with "a stone upon it." Undoubtedly this was simply a covering stone of the sort that was common when caves were used as places of burial. In any case, we know nothing more than these simple facts, which are consistent with the final incident of this kind, recorded in all four gospels—the death, burial, and resurrection of Jesus himself. According to these accounts (Matthew 27, 28; Mark 15, 16; Luke 23, 24; and John 19-21) Jesus after his crucifixion was placed in a cave as yet unused for burials; his body was treated with spices and ointments; and a stone was rolled in front of the cave opening. Consistent with the account of Lazarus' tomb, there is no mention of a monument, memorial, or marker of any kind, and consequently no report of any address to the subject either by Jesus, his disciples, or others associated with the events. On the contrary, it is clear from the closing chapters of each gospel that all emphasis falls not on the burial of Jesus or the practices associated with it, but on the sudden and dramatic events of Easter Sunday morning. It is Jesus' own miraculous resurrection from the dead, and his reappearance, alive and recognizable to others, that forms the center of the stories and gives inspiration to his disciples. For the gospel writers, this startling and crucial event signals victory over death, and by natural implication, marks a turn away from pagan, and even certain earlier Jewish, types of concern with burial or the gravesite.

The Biblical Epistles are concerned mostly with theological discourse, rather than narratives of historical events, so in these writings there is even less occasion to recur to the subject of graves or grave markers than there was in the gospels. There are, of course, several important and substantive discussions of the subject of death and its aftermath. It is notable, however, that these discussions, which were probably produced before the accounts of Jesus' life found in the gospels, stress the same overriding theme. With Christians, as with Christ himself, the burial and disposition of the body of the deceased is a now a matter of small importance, because a truth of far greater importance—the final resurrection and transformation of the body—has overwhelmed it. The most notable discussions of the subject, penned quite probably by the

Apostle Paul, are found in the Books of Romans (chapter 8), I Corinthians (chapter 15), and I Thessalonians (chapter 4). (Scholars dispute the authenticity of certain New Testament epistles, arguing the [*sic*] some, or even most, were written by personages other than those that claim in the texts to be the authors; since Christian tradition has regarded the texts as sacred and inspired regardless of such contentions, this dispute does not bear on the present discussion.) The significant thing about all of these discussions is that they show no interest in the particulars or customs of Christian burial because their entire focus, like that of the gospels, is on the momentous Christian teaching of the resurrection of the body. Its classic formulation is given by Paul in the Book of I Corinthians 15:51–53: “Lo! I tell you a mystery. We shall not all sleep, but we shall all be changed, in a moment, in the twinkling of an eye, at the last trumpet. For the trumpet will sound, and the dead will be raised imperishable, and we shall be changed. For this perishable nature must put on the imperishable, and this mortal nature, must put on immortality.”

This doctrine was not entirely new; the Jewish sect of the Pharisees, of which Paul may once have been a member, had taught it earlier. But like the gospel writers, Paul makes this teaching central and crucial to Christianity in a way that it was not to Judaism. And as in the gospels, the implications of this theological shift are of considerable significance for later Christian theology and tradition. It directs Christian attention away from the state or circumstances of the physical body after death, and turns it decisively toward something beyond this earth—the great day of resurrection and final judgment. What will happen to the body on the day of resurrection is momentarily important; how it is cared for or memorialized between the present moment and that day is not a serious or enduring concern.

The Biblical Book of Revelation trades heavily in apocalyptic symbolism whose interpretation and application to present-day religious concerns is the subject of considerable dispute among scholars. Mainstream scholarship does not find it to represent religious views that are significantly inconsistent with those of the Gospels and Epistles. Hence discussion and interpretation of this text can yield to that which has been provided with respect to these other types of literature, which represent the bulk of both text and teaching in the New Testament.

Is the placement of tombstones clearly and consistently affirmed in classic formulations of doctrine and practice?

On the matter of death and burial, as on most other matters, the classic doctrinal statements are to be found of [*sic*] the writings of Christian theologians and bishops of the first four to five centuries. Their formulations have set the framework within which most all of subsequent Christian thinking has been carried on. Most important among these are three early theologians from about the year 200 A.D. who gave these subjects extended attention. They are Irenaeus of Lyons in his treatise *Adversus Haereses*, Tertullian of Carthage in *De resurrectione carnis* and *Minucius Felix* in *Octavius* (Bynum, p. 34). All three center their attention on the paradox of the resurrected human body, asking such questions as: How can the body be resurrected and made imperishable? After decay, are its pieces reassembled like a puzzle? Or is it transformed like a seed that dies and

grows into a plant? Related to these questions, naturally, was also that of the state of the body after death. Should it perhaps receive special care and attention, being preserved safely in a tomb with a proper memorial, so as to facilitate resurrection? It is significant that whatever other differences they exhibit, the theologians engaged in these discussion agree unanimously that how the body is preserved, or cared for, or marked, ultimately has no effect on the power of God to resurrect and restore it on the final day. Writing in the midst of persecution, these church fathers were well aware of martyrs whose bodies had been eaten by animals or torn apart by persecutors, yet in their view, there was no doubt that the resurrection would bring complete restoration. As St. Augustine, the most influential of all early Christian fathers in the West and himself author of a treatise *De cura pro mortuis gerenda* would later write in *The City of God* in the case of a person who might have died of starvation, "His own flesh, however, which he lost by famine, shall be restored to him by Him who can recover even what has evaporated. And though it had been absolutely annihilated, so that no part of its substance remained in any secret spot of nature, the Almighty could restore it by such means as He saw fit" (Bynum, p. 104).

The effect of such teaching, accepted universally in both the Eastern and Western portions of the Church, was to be evident in all of subsequent Christian thought and practice. The church made no special investment of its authority in any particular form of preserving or protecting the bodies of the dead, still less in any specific form of individualized monument or memorial by which to remember them. Its focus was not on the life now past, but on the glorious new life to come. As it happened, most church fathers did prefer burial to cremation, but felt no need to insist on the matter (Douglas, p. 168). Even more clearly, they left no mandate that graves must be universally marked in any one particular fashion, let alone with a vertical marker or monument.

Has the practice of placing tombstones on graves been observed continuously, or nearly so, throughout the history of the tradition?

As we might expect, given the refusal of early theologians to offer any clear rule on the matter, Christian practice with respect to burial sites and monuments has varied enormously from the first centuries to the present. A number of early Christian burials took place in underground locations like the celebrated catacombs in and about the city of Rome. Because masses were said for the dead in these locations, the misconception has arisen that these were places of public worship. In fact, they were not. The catacombs, some of which existed prior to the Christian era, were visited mainly for burials and rituals associated with the dead (Ferguson, p. 163). At these sites bodies were deposited in chambers dug into the walls of narrow tunnels, a practice that discouraged the placement of monuments of any size, and by definition excluded markers visible above the surface of the ground. Archaeology shows no record of anything resembling a monument before the end of the second century. In the catacombs, Christians might simply carve the name of the deceased into the wall and perhaps add the symbol of the fish, the word for which, in Greek, served as an acronym for a simplified Christian creed: "Jesus Christ, Son of God and Savior" (Berardino, p. 155–56).

In subsequent Roman centuries, and especially after the end of persecution, specifically Christian cemeteries began to emerge both above and under ground. At these locations, writes one authority, practice was guided by the Christian attitude that normal dead bodies "should not be accorded special treatment. While the ancient Greeks and Romans often carved portraits on tombs or painted images of the dead on wooden markers, Christians turned away from the pretentious tomb as a symbol of worldly concern. Only the remains of holy men and women deserved special respect, and these might be in the church" (McDannell, p. 105). The general rule was modesty and restraint. As another authority notes, Christians even opposed the Roman practice of placing a crown on the head of the deceased; though fully hidden after burial, such an adornment was nonetheless regarded as idolatry; all honors were to be reserved to those saints who had won the crown of martyrdom (Paxton, p. 25).

Over time, and as Western culture moved into the early medieval era, this growing cult of the saints and martyrs had a profound effect of its own on burial customs. The hope of most ordinary Christians was not to be housed in a private tomb, with some enduring personal monument, but to be buried, nameless and with no abiding memorial, in a common grave *ad sanctos*—"near the saints" (Aries, Hour, p. 33). In the later centuries of antiquity, there developed throughout the Christian world the firm belief that both the presence and prayers of the saints, especially those martyred for the faith, offered the only real assistance available on the journey toward heaven that awaited all on the day of death. Saints often were buried with great honors in the churches themselves, and once they had been so placed, Christians of every succeeding generation strove to be buried as near as possible to these now immortal sources of spiritual power (Aries, Attitudes, p. 16). If possible, they hoped for burial in the church; if not, in the churchyard, for that was still near enough the saints to be sacred ground, offering the promise of easier access to heaven.

Of course, not all Christians were buried nameless in common graves. By about the 11th century, the midpoint of the medieval period, the growing wealth of the church mingled with the piety and vanity of the aristocracy to open the way toward burial effigies, memorials, and monuments on a grand scale. In the later Middle Ages and throughout the Age of the Renaissance, the trend toward such display was to give the churches of Europe some of its very finest art, architecture, and sculpture (Aries, Hour, pp. 202-93). The crucial point to notice here, however, is that these were always rare and optional enterprises reserved only for saintly heroes of the church and those very few others whose wealth or power enabled them to claim special attention from the ecclesiastical hierarchy. For the vast majority of Christians, a nameless common burial was all that was expected; and the theology of the church made it clear that nothing more was needed. Individualized monuments or markers were neither required nor, for most, realistic. It is important to note further that the custom of unmarked common graves was not confined to the limited medieval episode of hardship and privation often called the Dark Ages. The custom of unmarked communal burial for the masses persisted in Western culture up to the very edge of the modern era, often creating formidable problems of health and sanitation. As has been noted by Phillipe Aries, the French cul-

tural historian whose *Hour of Our Death* remains the classic study of the subject, the customary procedure of communal burial made the churches and churchyards of Europe "veritable cities of the dead" (p. 49) from Christian antiquity up until barely two centuries before our own. The bearing of this evidence on the present case would seem now to be fairly clear. The tradition of Christian burial practice cannot provide a warrant for monuments as integral and essential to individual gravesites when for most of its long history, most Christians have had no such thing as a personal grave even to mark.

Is the placement of vertical tombstones consistently practiced everywhere, or almost such, in the tradition as we meet it most recent times?

If a case for vertical tombstones can be made at all, perhaps the nearest justification would have to come from modern, if not quite contemporary, practice. Aries and other authorities on Western attitudes toward death agree that approximately two centuries ago in middle-class Western communities, a shift of burials away from the churchyard and toward individual marked graves gradually did begin to take place. This development was driven in part by the problems of overcrowding and sanitation that appeared with the growth of large cities in Europe (McManners, pp. 303–67). In part as well, it was occasioned by a rise of individualism of the post-Reformation era and, more significantly, by the secularism of philosophers of the Enlightenment and the Romantic sentimentalism of poets and artists in the Napoleonic era and after (Stannard, pp. 171–88). Whatever the mix of underlying causes, Western Europe and America saw by the early 1800s the flowering of what historians have called the "rural cemetery movement"—the development in the areas surrounding major cities of large, mainly rural, public cemeteries designed to provide for burials in a peaceful, pastoral setting removed from the influence of the churches. The most noteworthy European case of this sort was the famous Pere Lachaise cemetery in Paris, while in America, Mount Auburn Cemetery in Boston, Laurel Hill in Philadelphia, and Greenwood in Brooklyn, all founded in the 1830s, represented the same cultural trend (McDannell, pp. 105–108; Stannard, pp. 171–88). Their purpose was to provide a place of serenity and beauty, away from ecclesiastical influences, where families and friends could gather to contemplate and to remember those they had loved in life. And it was in these cemeteries especially that over the period from the 1830s up to about the 1960s that the option of erecting monuments for loved ones came to full expression.

The rural cemetery movement has always had its critics both esthetic and cultural, but it offers almost the only historical precedent that can be found to justify recourse to vertical monuments or markers in cemeteries. Unfortunately, however, there is a serious problem with an appeal even to this quite limited and recent development. The great difficulty—and indeed irony—in appealing to this precedent is that of all burial customs found in Western culture, this is among those least tied to the exercise of religiously inspired practices of burial and remembrance. In America, though Christians and Jews certainly participated, the rural cemetery movement was propelled not foremost by churches and synagogues, but by an effort to move away from traditional religious forms

while embracing a new, more secular and purely sentimental artistic sensibility. Its purpose was actually to escape the interests, forms, and customs of conventionally religious burials. Thus, while an appeal can perhaps be made to the rural cemetery precedent, it is an exceedingly poor fit for legal arguments that claim to rest on principles of the free exercise of religion in either the Jewish or Christian traditions. To the degree that Christians and Jews ever embraced this tradition, it is clear that they did so as not as in any way a religious obligation, but as a matter of personal taste—and a preference rather strangely at odds with their own religious traditions.

A final point. The evidence of both Christian and Jewish burial practice in recent decades offers additional proof of just how much a matter of personal taste—that is, marginal or tangential to religious exercise—the rural cemetery custom of gravesite monuments has always been in American life. Recent years have brought a trend not only away from the monumental display of the past, but toward its very opposite. Religious individuals today readily turn to cremation, with ashes kept privately or scattered to a favorite locale. To the degree that cremation, with no recourse at all to a public memorial, is now found by many to be not only an acceptable but even preferred option, it remains fundamentally unpersuasive to claim even that burial, either in itself or accompanied by a monument of some specific form, is essential and integral to either Jewish or Christian religious traditions.

To summarize this report briefly: By the main criteria relevant to the issue, the erection of burial monuments in vertical or any other specific form cannot be shown to be essential and integral to either the Jewish or Christian religious traditions. There is no relatively unambiguous assertion or implication of such a practice in either set of sacred scriptures. There is no clear and consistent affirmation of such a custom to be found in the classic formulations of doctrine. There is no long-standing or nearly continuous history of such a practice in either tradition. And there is no evidence that such a custom is consistently and widely practiced in more recent times. If the practice of erecting vertical tombstones were to meet the criteria in just one or two of these categories, one might well have at least the beginning of a persuasive legal argument in this case. In fact, however, it seems to clear the threshold of qualification in none of them. Hence, there would seem to be no reasonable ground for the plaintiff's contention that the defendant's restrictions on such monuments violate the legal standard enacted by the RFRA. In sum, the combined testimony of theology, history, and tradition indicates that such restrictions do not "substantially burden a person's exercise of religion."

#### BRIEF COMMENT ON PROFESSIONAL CREDENTIALS:

I currently serve as the Associate Dean of the College of Arts & Sciences in the University of Miami. For sixteen years prior to my appointment as a dean, I served as the Chair of the Department of Religious Studies in the College. I am the author of academic articles and books in the history of religions; my most

recent book is *Seven Theories of Religion* published by Oxford University Press in 1996.

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EXPERT REPORT OF WINNIFRED FALLERS SULLIVAN

DECEMBER 2, 1998

I have been asked to give expert testimony on the religious importance of practices surrounding burial and memorializing of the dead. I have read the depositions and documentary evidence in *Warner v. City of Boca Raton*, No. 98-8054-CIV-RYSKAMP, filed in the United States District Court for the Southern District of Florida. The rules and practices of Boca Raton Municipal Cemetery and Mausoleum, with respect to the decoration of graves are at issue in this action.

I am Assistant Professor of Religion at Washington & Lee University in Lexington, Virginia. I hold a Ph.D. in religious studies and a J.D., both from the University of Chicago. My expertise is in theory in the study of religion, in American religion and in how religion is defined and dealt with in a legal context.

Scholars of religion do not agree on a definition of religion. Religion is understood variously to be, for example, rituals, beliefs, actions, myths and symbolic structures:

- that are associated with supernatural beings;
- that are concerned with the ultimate meaning of life;
- that formalize and reinforce political and economic power;
- that are psychologically produced;
- that are the characteristic production of structures of the human brain;
- that express the self-understanding of a particular society;
- that construct and express individual and communal identity
- or, that are expressions of a universal human experience of the sacred; among others.

Religion scholars would largely agree, however, that practices surrounding human death, while of enormous variety, are close to the heart of religion and of the religious imagination, however it is defined. In all human societies human death is marked, ritualized and memorialized, and those practices form a central and important part of religion. Funeral rites, through gestures, behavior, words, songs, material objects, meals, and treatment of the corpse, function

- to serve the future life of the dead person,
- to console the surviving relatives and friends;
- and, to contribute to the reconstruction of and preservation of the community.

Religion scholars would also largely agree that authentic religious practices include both those founded in textually based doctrine taught by institutionalized hierarchies as well as in folk traditions and customs passed down through families and communities.

A cemetery is a place where remains are both preserved and concealed. It is a place of transformation, closely associated with the maternal symbolism of the earth. Important religious practices associated with cemeteries might include:

- identification of the deceased and the deceased's religious commitments and community;
- covering of the grave to emphasize its sacredness and to prevent people from walking on it;
- planting of flowers, symbolic of life or as an offering;
- placing of material objects symbolic of the dead person's life or of the mourner's religious devotion;
- placement of statues as a focus for religious devotion;
- erection of a cross, the quintessential Christian symbol;
- creation of a space conducive for prayer;
- lighting of candles;
- family visitation.

A person could be substantially burdened in the practice of his religion if his beliefs and practices surrounding human death were interfered with. The religious importance of such beliefs and practices might be determined by reference to the historic prescription or custom of a particular community, by consideration of its place in the larger religious life of the community or the individual and its relation to other religious actions or events, or by analogy to other beliefs and practices.

"Catholicism, Judaism, Protestantism" and other such catch-all descriptive terms are convenient abstractions of complex realities. Generalizing about "all" Catholics, or Protestants, or Jews in terms of belief or practice is very hazardous. In each case, there is enormous variety within the tradition, both across space and across time. For example, what is "Catholic" in one place and time may vary enormously from what is "Catholic" at another place and time. And it would depend on who you asked. There is no such thing, therefore, as "the church" as a constant entity, except in a highly philosophical or theological sense. One cannot accurately speak of Catholicism, or Judaism, or Protestantism "requiring" a particular practice or belief. One can only speak of Jewish or Protestant or Catholic authorities in a particular community at a particular time—and even then they are likely to disagree. It is in the nature of religion to be both local and to be a constantly changing reality.

In the American context, in particular, it is particularly difficult to speak of religious beliefs or practices being "required" by a particular religion. Because of disestablishment and of the religion clauses of the First Amendment and of state constitutions, no established religious authority is publicly acknowledged as having greater authenticity than another. In other words, the state has no way to determine the orthodoxy of a particular religious practice or even to determine which authority is the appropriate one to determine the orthodoxy of a particular practice. Each individual is, in effect, the expert on his or her own religious life, a life which may be an idiosyncratic assembly of beliefs, interpre-

## APPENDIX B

tations and practices. The state may not give preference to one sincerely motivated religious expression over another because of its supposed historicity, orthodoxy or pervasiveness. The state has no way to make such theological determinations without giving an unconstitutional preference to a particular religious world view. While for the external observer religious beliefs and practices may be radically indeterminate, for the individual believer they may have tremendous authority and power. The practices described in the depositions in this action: the design, orientation and placing of markers and statues, whether explicitly religious or not, the covering of the grave, the planting of shrubs, ground cover and flowers, the concern for the overall appearance and convenience of a cemetery, and the visiting, praying, and attention to the needs of the deceased may all be considered important religious practices in the context of a particular individuals religious life.

On the basis of my reading and research in the study of religion generally and relying in particular on the works cited below, it is my opinion that practices associated with a burial site could be so important to the exercise of a particular person's religion that prohibition of such practices could substantially burden that person's exercise of his or her religion.

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## APPENDIX B

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