The Right of Ecclesiastical Burial

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INTRODUCTION

Undoubtedly, the final privilege of a Christian life is to be the recipient of the Church's prayers and to be buried with the Church's special rites. From earliest times, Christian burial was a religious rite and an ecclesiastical function serving the living as well as the worthy deceased. Christian burial was considered a privilege that could be denied to a member of the Church for certain grave infractions against Christian life and faith.¹ The Code of Canon Law, revised in 1983, broadens this privilege and restricts further instances of its denial in response to several significant legal-pastoral developments since the 1917 Code and the Second Vatican Council.

This Article shall: (1) explore this unique privilege of Christian life, tracing its evolution through the historical development of the Code of Canon Law, highlighting certain ideological, legal, and ecumenical shifts with respect to the denial of Christian burial; and (2) analyze the new Canon Law on the denial of ecclesiastical burial, suggesting alternatives to current practices.

THE CLASSICAL LAW

Catholic tradition since the formulation of the first Code of Canon Law in 1917 provides that all who are baptized are entitled to ecclesiastical burial unless otherwise prevented by law.² Therefore, virtually every...
baptized person has a legal right to the Church's prayers and suffrages at the time of death. Through baptism one gains membership in the Church as well as the right to the respective sacraments and sacramentals. In the first Code, an exception was made in the case of catechumens who died before they sealed commitment to Christian life. These individuals were counted among the baptized by reason of the baptism of desire.\(^3\)

The utilization of the denial of Christian burial as a penal sanction dates back to the fifth century.\(^4\) During that period the Church began to develop as a broad-based juridical institution. Accompanying this rapid development was an increase in Church membership, thereby creating a need for greater structure and organization. In order to maintain order and to resist external persecution and internal dissent, the Church promulgated penalties whereby the criminal would forfeit his rights to ecclesiastical burial for certain crimes against the Church. Heresy, apostasy, schism, or a lifestyle shameful to conscientious Christian practices were included among the designated crimes. The penalty was clearly a means of maintaining the rigid lines of demarcation that existed between those in communion and those outside communion with the Church.\(^5\)

The crystallization of Church discipline under the 1917 Code classified those denied Church burial in two categories: (1) the unbaptized, including infants, who lacked canonical rights and (2) the baptized, who were penalized during their lifetime and denied the rite upon death. Baptized non-Catholics, generally, were not envisioned as clear subjects of ecclesiastical law under the first Code because of the obex placed by their state of separation from the Catholic Church. Although not expressly forbidden Catholic burial rites, custom prevented these individuals from who are baptized are entitled to an ecclesiastical burial; namely, that those who have died without baptism could not be admitted to Christian burial. \textit{Id.} § 1. This exclusion extended to the deceased, unbaptized children of Catholic parents and denied these deceased the right to sacred funeral rites and the right to burial in a sacred place. 2 J. Abbo & J. Hannan, \textit{The Sacred Canons} 493 (2d rev. ed. 1960).

\(^3\) \textit{Code, supra} note 2, Canon 1239, § 2. Catechumens, those receiving instruction in doctrines, discipline, and morals preliminary to admission among the faithful, were treated as baptized because they were rightfully supposed to have met death united with Christ. 2 J. Abbo & J. Hannan, \textit{supra} note 2, at 93.

\(^4\) St. Leo the Great (440-461 A.D.) explicated the usage of the denial sanction, reasoning that, because the Church did not associate with heretics, schismatics, and other anti-Christians while they lived, it should not associate with them posthumously. \textit{See Pope St. Leo the Great—Letters} (The Fathers of the Church 2d ed. 1957); \textit{see also Code, supra} note 2, Canon 1240.

\(^5\) The primary test of whether a person was in communion with the Church or outside communion with it was whether that person had reconciled with the Church before his death. If the individual had failed to do so, the Church would be unable to communicate with him and he would be denied the right to ecclesiastical burial. \textit{See Corpus Iuris Canonici, Decretal. Gregor. IX. Lib. III. Tit. XXVIII de Sepulturis Cap. XII.}
participation in Church sacraments and sacramentals because of this lack of full communion.6

Christian burial under the Code included transfer of the body to the church, funeral Mass, and interment.7 All three elements were denied in the refusal of ecclesiastical burial. Partial rites could have been granted to an individual where that individual, as determined by competent authority, had performed an action indicating worthiness for Christian burial.

Classical law always limited the penalty of denial to the notoriously guilty and unrepentant. If denial was to occur it was meant to occur rarely. The Church construed notorious to require that one's offense be well known by a large portion of the community, or that the crime be confessed before a judge who may or may not take judicial action.8 Further, notoriety required that one's crime be a matter of public record and include the element of scandal, a factor that debased the morale of the Christian community. An essential aspect for the denial of burial rights was the individual's own awareness of the criminality of the act, and an awareness of his own culpability.9

The 1917 Code enumerated those persons guilty of crimes punishable

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* Although Catholics were forbidden to take active part in the religious services of non-Catholics, see Code, supra note 2, Canon 1258, § 1, a passive presence could, for a serious reason, be tolerated out of respect for non-Catholics at funerals, weddings, and the like, id.; 2 J. Abbo & J. Hannan, supra note 2, at 513.

The 1917 Code further emphasized this separatism by not supporting any cooperation with Christians of other ecclesiastical communities. For instance, it forbade Catholics to read certain literature not produced by the Catholic Church. See Code, supra note 2, Canon 1399. Among the prohibited works were editions of Scripture published by any non-Catholic, books propagating heresy or schism, and books dedicated to an assault on religion. See id. 1°-3°. The only canon that allowed some openness with the non-Catholic was Canon 1325 section three, which restricted participation in debates and conferences among non-Catholics except where permitted by the Holy See or in an urgent case with permission of the local ordinary, id. Canon 1325, § 3.

7 Code, supra note 2, Canon 1204. Unless prevented by serious reason, the bodies of the faithful must be taken from the place where they rest to a church. See id. Canon 1215. The church where the body was to be transferred for the funeral was, generally, the church of the parish in which the deceased was a member. Id. Canon 1216, § 1.

8 A. Vermeersch & J. Creusen, Epitome 319 (1925). The Code delineated two distinct concepts of notoriety. See Code, supra note 2, Canon 2197, 2°-3°. If a crime was “notorious in law,” it had been declared to be such by a competent judge. Id. 2°. A crime was “notorious in fact” if it was publicly known and had been committed in circumstances in which it was entirely impossible either to conceal it or to offer any legal justification for it. Id. 3°.

9 The Code required the existence of three elements in order for a crime to have occurred. Code, supra note 2, Canon 2195. These included: 1) “the juridical element . . . a previously enacted law imposing a penalty”; 2) “the material or objective element,” the act or manifestation of the violation of the law; and 3) “the moral or subjective element,” the imputability of the act. Id. (emphasis in original).
by the denial of Christian burial as follows:10 notorious apostates of the Christian faith;11 formal heretics and schismatics;12 anticlerical groups and other such associations that conspired against the Church;13 those excommunicated or placed under interdict by declaratory sentence;14 those who committed suicide delibero consilio;15 participants who died as a result of wounds inflicted in a duel;16 those who ordered their bodies cremated;17 and other public and manifest sinners.18

10 Id. Canon 1240, § 1. Persons guilty of these crimes are denied the privilege of Christian burial unless, before death, they have evinced some sign of repentance. Id.
11 An apostasy occurs when a baptized Christian, after he has exercised his membership in the Church, abandons the faith in its entirety. J. Hardon, The Modern Catholic Dictionary 34 (1980). The sanction of automatic dismissal is placed on those religious who have publicly apostatized from the Catholic faith. Code, supra note 2, Canon 646, § 1; see id. Canon 1325, § 2. The penalty of excommunication for the crime of apostasy is one of those specially reserved for the Holy See. See id. Canon 2314, §§ 1-2.
12 A person is in schism if, after the reception of baptism, he refuses allegiance to the Roman Pontiff "or rejects communion with the members of the Church . . . ." Code, supra note 2, Canon 1325, § 2. If the schismatic denies papal supremacy or one of the other dogmas, he falls into heresy. Id. Heresy is a rejection or denial of the fundamental Christian doctrines by one who is a baptized member of the Church. Id. See generally 6 New Catholic Encyclopedia 1063-69 (1967) (discussion of history of and various types of heresy). Secret or private disbelief or disagreement with Church teachings was not punishable under the Code as long as such feelings remained in one's conscience. See Code, supra note 2, Canon 1325, § 2.
13 The Code provided that ecclesiastical burial should be denied to persons who were "notoriously adherents of . . . the Masonic order or of other societies of the same kind." Code, supra note 2, Canon 1240, § 1, 10. The important requirement was that of notoriety, which, in order to effect the denial of Christian burial, had to have been present either in law or in fact. Id.
14 The censure of excommunication excludes one from communion with the faithful and reception of the sacraments. Id. Canon 2257, § 1. Excommunicated persons are classified into two groups with different privileges and sanctions. Some of these individuals "are to be entirely avoided [vitandi]," while "others are tolerated [tolerati]." Id. Canon 2258, § 1 (emphasis in original).

An interdict censure differs from that of excommunication in that it allows individuals to remain in communion with the Church while it forbids their participation in "divine services, Christian burial, the sacraments, and the sacramentals." Id. Canon 2268, §§ 1-2.
15 In order to prevent people from having a casual attitude about self-murder, the Church denied Christian burial privileges to those persons who had committed suicide, a crime that St. Thomas Aquinas considered to be greater than that of homicide. See 2 T. Aquinas, Summa Theologica Q. 64, art. 5 (Fathers of the English Dominican Province trans. 1947). In order for this sanction to be applied, "the fact that the deceased committed suicide must be certain, as well as the fact that he was [wholly] responsible" for his acts. Code, supra note 2, Canon 1240, § 1, 3. If there is any doubt as to the decedent's state of mind, a private funeral would, generally, be allowed. Id.
16 A death occurring as a result of a duel was equated by the early Church with suicide, if not homicide. Id. Canon 2351, § 1. In addition to the actual participants in the duel, those spectators who permitted duels to occur were subject to excommunication. Id.
17 The denial of ecclesiastical burial was applied to persons who had requested that their
The 1917 Code facilitated rescission of the denial when the offender made a redeeming gesture of repentance, irrespective of its magnitude. Some sign, despite its seeming insignificance, was sufficient to reverse the order of denial; for instance, sending for a priest, requesting the sacraments, kissing a crucifix or any utterance of regret relative to the crime would enable the offender to become the recipient of burial rites. If an indication of repentance was established prior to death or if there existed doubt about the extent of one's repentance, classical law favored granting ecclesiastical rites, provided the scandal of the crime was removed prior to the concession. It is evident, therefore, that the penalty of denial was not to be imposed capriciously. The denial of Christian burial was an extreme penalty, levied upon those who committed intolerable acts against the Church.

**INTERIM PROBLEMS RESULTING IN DENIAL OF CHURCH BURIAL**

The Code of Canon Law does not contain an explicit provision for modification, although it does provide for change by preemption of the old law as a result of a new law or custom. In Book One on General... bodies be cremated, even if the order was not put into effect. *Id.* Canon 1240, § 1, 5o. Catholics were prohibited to carry out the demand of the decedent for cremation, and if such a request was codified in a contract or other document, it was to be disregarded. *Id.* Canon 1203, § 3. This concept was derived from the Church practice of burying the dead out of respect to their bodies, which were considered to be temples of the Holy Spirit. See 2 J. ABBO & J. HANNAN, supra note 2, at 470. The act of interment was significant in that it signaled the termination of temporal life and the commencement of life beyond the grave. *Id.*

19 Public and manifest sinners could be refused a proper burial. However, such denial was balanced against the seriousness of the transgression. See Code, supra note 2, Canon 2222, § 1; T. BOUSCAREN & A. ELLIS, CANON LAW 869 (2d rev. ed. 1951).

While canon law was generally rigid in this area, allowances were made in certain situations in which an unyielding application of the law would cause unnecessarily harsh results. The Code provided that:

> If a doubt should arise in regard to the application of the law . . . the ordinary shall be consulted, time permitting if the doubt persists, the body of the deceased shall be given Christian burial, in such a way . . . as to prevent scandal, e.g., by divulging the fact that the deceased showed signs of repentance or that the [decedent] committed his crime in a moment of mental aberration.

*Id.* Canon 1240, § 2.

18 Canon 22 provides for abrogation of former law, when "enacted by competent authority," in situations where (1) the old law is explicitly preempted by the new law; and (2) where the new law provides for a complete revamping of the former to the extent that the actual effect of the new law is directly contrary to the old law. See Code, supra note 2, Canon 22. However, Canon six, degree one explicitly provides that a specific law, that is, one addressing specific places or persons, will not be preempted by a general law unless explicit reference is made to the former law. *Id.* Canon 6, 1o. Presumptions as to revocation of the former law do not exist when the circumstances surrounding the scope of a new law are doubtful. *See id.*
Norms, however, there was a subtle suggestion that ecclesiastical laws do evolve by the extent of their use in the community.\textsuperscript{20}

Although the 1917 Code was promulgated during a period that was both culturally and legally more restrictive, the laws governing the restriction of Christian burial began to develop and to be refined almost immediately after their enactment. The changes were adopted primarily to accommodate situations where there existed a variety of mitigating factors surrounding the death of the individual.

\textit{Unbaptized Infants}

The legal and theological support for denial of Christian burial to the unbaptized is clear. The Church's belief in original sin and the necessity of baptism necessitated a rigid approach in this area. Laxity was perceived as an undesirable disincentive to the prompt baptism of infants, thereby undermining this fundamental creedal belief. Thus, the importance of baptism clearly overrode any individual considerations.

Pastoral experience has shown, however, that such obstinate policies collapse when confronted with the unique emotions associated with the death of an infant. Barring unbaptized infants from the rites of the Church and burial in blessed family plots has been \textit{odiosa} from the day of the Code's promulgation. Often unbaptized infants were extended Christian burial notwithstanding provisions to the contrary in the Canon law. Partial rites were granted them in many instances. In many places if a child and mother died together during childbirth they were buried together with full Christian rites.

The treatment of the unbaptized infant presented a dilemma for the Church, the faithful and the theologians. As a result, there has been a palpable shift in the \textit{sensus fidelorum} regarding these infants. Current attitudes toward the denial of Christian burial to unbaptized infants are summarized as follows: (1) The denial neither signals damnation of a soul nor a pledge of salvation, nor a reward for a good Christian life; (2) no certainty exists as to the place in eternity that the souls of unbaptized infants occupy; (3) as the Christian funeral rite renders a significant service to the bereaved, due consideration of their plight must be given to assure a continued dialogue between the Church and the faithful. Since

\textsuperscript{20} The Code provided that custom was the best means of interpreting the laws. See \textit{id.} Canon 29. If the law was unambiguous, custom was seen as an expression of its execution on the part of the community. 1 J. ABBE & J. HANNAN, \textit{THE SACRED CANONS} 57 (2d rev. ed. 1960). If the meaning of the law was obscure, custom would provide an interpretation. \textit{Id.}
the denial of Christian burial is implemented primarily as a penalty against those who have committed crimes against the Church, the lack of concession to an innocent infant was an unusually harsh penalty even in a period of legal rigor.

Baptized Non-Catholics

The laws under the 1917 Code prohibiting the concession of the sacraments and sacramentals to all who were not in visible communion with the Church were rigidly enforced as well. These proscriptions were fashioned in a noticeably less ecumenical age. The Canon Law did not envision reasons of spousal or familial affection justifying the burial of a non-Catholic in a Catholic cemetery. Granting ecclesiastical rites for baptized non-Catholics, however, has been advocated by an increasing number of the faithful in recent years, due to the cultural, religious, and social integration of Catholics with other Christians. While marriages of mixed religions were infrequent occurrences at the time of the promulgation of the Code, current social norms include situations involving marriages of mixed religions, and individual non-Catholics serving the Church in a civil capacity or having some affinity with the Catholic Church. Other reasons also exist for the encouragement of Church burial of baptized non-Catholics. Some individuals plan on eventually taking instructions in the faith, while others plan on dying as a Catholic, and still others ask for a priest on their death bed. Thus, many religious and lay people alike encourage the concession of burial rights.

The usual style and praxis of the Holy See when the rite was granted in these instances was to require the non-Catholic first to retract, implic-

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81 See Code, supra note 2, Canon 731, § 2. The Code expressly prohibited the administering of the sacraments to heretics or schismatics, even those who have, in good faith, requested them, unless they shall have previously confessed and renounced their erroneous ways and have obtained reconciliation with the Church. Id.

82 The Code was quite adamant in the stance it took regarding marriages of mixed religions. The Church expressly forbade the contracting of such marriages and would dispense with its sanctions only in special cases. See id. Canons 1060-61. To do so, the Church required satisfaction of the following conditions: first, that there be just and grave reasons for the dispensation; second, that the non-Catholic shall have given a guarantee to remove all danger of perversion from the Catholic party; third, that both parties shall have given guarantees to baptize and educate their children in the Catholic faith alone; and fourth, that their exist a moral certainty that the aforementioned guarantees would be fulfilled. Id. Canon 1061, § 1. Such an agreement was ordinarily required to be in writing. Id. § 2.

The Code even went so far as to require bishops and priests to “deter the faithful from entering mixed marriages.” See id. Canon 1064. If unable to prevent such marriages, the bishops and priests were required to assure that they were not contracted in violation of “the laws of God and the Church,” and to watch diligently to see that the parties faithfully discharge the promises they have made. Id.; see also id. Canon 1102 (outlining ceremony to be utilized in a mixed-faith marriage).
itly or explicitly, the "error" of his religious tradition. Historically, there was some openness to the official presence of a Catholic priest at the funeral obsequies of a non-Catholic. However, a clear reluctance existed toward bestowing the sacraments and sacramentals to the baptized non-Catholic without such a retraction.

Certain Public Sinners

A basis for the utilization of the denial of Christian burial was to emphasize to the faithful the gravity of certain crimes against both the Church and civil society. Certain offenses, such as those represented by the number of civilly divorced and subsequently remarried individuals, and those unions attempted without observance of ecclesiastical, ceremonial formalities, have been increasing somewhat in recent years, and one may validly argue that these individuals are public sinners. Ironically, many transgressors of Church law are piously practicing their faith as well as instructing their children in the fundamental Catholic dogmas and the sacraments. A strict application of the Code would deprive these individuals of Church burial by reason of their persistent life outside the Church. If denial was levied against those advocating Christian life, however, such application would ostracize both parent and child. To strengthen the religious bond among these individuals and the Church, some pastors have allowed the funeral Mass to the divorced and remarried who have overtly adhered to Christian tenets or displayed some other form of repentance or sincerity.

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28 Although priests were permitted to visit and exhort schismatics to prayer and contrition, they were prohibited from administering the sacraments of the Church to them unless they had rejected their errors and had been reconciled to the Church. See 3 T. Bouscaren, The Canon Law Digest 300 (1953); see also supra note 21.

24 See Code, supra note 2, Canon 1069. Under the Code, persons who had civilly divorced and subsequently remarried would be deemed to have violated the law that a person may not contract to marry if he or she is already constrained by a prior marriage. See id. Such prior marriage was not regarded as dissolved until its nullity had been established to a certainty. Id.; see also id. Canon 2209 (concerning culpability of "accomplices" to the crime); id. Canon 2231 (application of penalty to cooperators).

25 The Code required that a valid marriage had to have been contracted before a bishop, pastor, or priest and at least two witnesses. See id. Canon 1094. The penalty of excommunication may be handed down in the following instances: a) the partners marry before a non-Catholic minister in violation of the prohibition of Canon 1063; b) the partners marry with the explicit or implied agreement that all or any of the children shall be educated outside the Catholic Church; c) the parents knowingly offer their children to non-Catholic ministers for baptism; and d) the parents knowingly have their children educated or instructed in a non-Catholic religion. Id. Canon 2319.

In addition to the penalty of excommunication those persons who perform those acts forbidden by (b), (c), and (d) above, are under suspicion of heresy. Id.
Suicides

The expression *deliberato consilio* in Canon 1240, section 1, 30 of the 1917 Code delineated a clear line between culpable and inculpable suicide. It is unclear which principles or concepts in the Code serve as the basis for the Church's position on deliberate suicide. The increasing realization that there were frequently mitigating circumstances and factors surrounding an act of suicide, not to mention a presumption against one's mental stability at the time of the act, directly limited the frequency of the imposition of denial.

The Qualifiers: Notoriety and Scandal

As a qualifier, notoriety is not subject to a precise objective interpretation. It therefore lacks the necessary clarity to provide a basis for uniform application of the law. However, had a more concise definition been supplied by the Code, the application of "notorious" would become regimented and would lack the necessary flexibility to be applied in a just and appropriate manner. The difficulty in the usage of notoriety and scandal is evident from the disparate impacts that the same crime would have in communities of different sizes.

The *admiratio* of the faithful can easily be aroused when an unrepentant delinquent is refused burial in one jurisdiction and an unrepentant offender, guilty of the same crime, is granted burial in another. The same crime committed in a large city, as contrasted with a small town, often results in entirely different effects upon those communities, thereby causing the penalty of denial to be meted out differently.

The occurrence of a scandalous crime may have an effect upon the psyche of individual members of the community or upon the community at large. Susceptibility to scandal will vary with changing spiritual and cultural circumstances, as well as with the occupation and level of education of the members of the community. Individual groups or members of the community may have been highly impressionable or of sensitive conscience. Thus, it fell to the local bishop or the pastor to assess the scope of the scandalous crime and its respective effect upon the community. When a truly scandalous crime was committed, the bishop was obligated to balance the extent of the scandal against the mitigating factors, if any, and only if the crime was one that impinged upon the welfare of the Christian community, was Christian burial to be denied. Thus, the problem of an unequal application of the law surfaced from the discretion accorded to bishops in various communities.

Estrangement of the Bereaved

Denial of Christian burial and its accompanying prayers and sacra-
ments, even for the most heinous sinners, is questionable due to the effec-
ts of denial upon the family of the deceased. Denial is one of the most
loathsome Church penalties; there is no greater rejection than to be de-
nied the Church's blessings at the time of death. Denial of Christian bur-
ial takes its greatest toll on the emotions of the bereaved acquaintances.
Such individuals may hold the Church in contempt for these oppressive
laws. It was recognized that the law could be further tempered with
mercy and toleration in order to avoid greater polarization among the
Church, the faithful and the community at large. In fact, many members
of the Church questioned whether, given the nature of the Church as a
forgiving and merciful entity, it was ever proper to deny Christian burial
rites to a Catholic.

THE CONCILIAR PERIOD

Some of the aforementioned interim problems surfaced in the prepar-
atory sessions for the Second Vatican Council. These preliminary ses-
sions commenced a year after the Council was called in January, 1960.

The schema on the sacred liturgy emerged from one of the
praeparatoria commissions on or about March 29, 1962. Chapter Three of
schema, de exsequiis, proposed that a renewed funeral rite be structured
for the Latin Church to nurture a fuller sense of hope in time of Christian
death. It provided for regional and cultural adaptation of burial rights
and for the creation of a specific burial rite for unbaptized children.

The Secretariat for Promoting Unity and the Doctrinal and Oriental
Commissions prepared schemata on the topic of ecumenism with respect
to the sacraments and sacred places. During the preliminary sessions for
the Council some bishops fervently called for a re-examination of the spe-
cific Canons on the denial of Christian burial. The issue, however, was not
particularly pressing for the Council Fathers when the schemata were in-
troduced on the Council floor and, therefore, was not acted upon. The

28 The schema, de exsequiis, recognized a number of problems in the traditional funeral
rite, namely, that the full understanding of hope was not exhibited, that the readings and
responses were dark in mood, and that the faithful present at the liturgy appeared to be
absent from the orations and prayers of the Church for the deceased. See ACTA ET DUC-
MENTA CONCILIO OECUMENICO VATICANO II APPARANDO 284 (1968) (Exsequiae parvulorum).

By way of resolving these difficulties, the schema provided for variations in the readings
and prayers so that the paschal sense of Christian death may be proclaimed, and so that the
faithful could more fully participate in the rites. Id.

27 Among the issues, other than ecclesiastical burial, that were addressed by the Secretariat
for Promoting Unity and the Doctrinal and Oriental Commissions were whether sacraments
may be shared, whether it was permissible for Catholics to hear Mass with the orthodox in
cases where Catholic churches are not available and whether it was permissible to adminis-
ter last rites to a non-Catholic. See 2 ACTA ET DOCUMENTA CONCILIO OECUMENICO VATICANO
concern with right and denial of Christian burial appears to have been left to the appropriate Roman Curial Officers or the Commission for the Revision of the Code of Canon Law.

The Second Vatican Council was a pastoral council. Although the Council issued legal directives during its various sessions, it did not, unlike earlier ecumenical councils, promulgate binding canons. The Council concerned itself solely with the issues and practicalities of the Church's pastoral direction in a world of rapid social change. The eventual revision of the Codal norms was left to a special commission established to update the canons in order that they be coordinated with the Council's pastoral conclusions.

During the period of the Second Vatican Council, the Holy Office issued an Instruction enabling greater flexibility in the law regarding cremation of the body. In response to numerous petitions to Rome, the Church desired to provide some relief for those cases in which there was a serious need for cremation. It was recognized in this document that attitudes toward cremation were no longer generally inspired by motives of hostility to the Christian belief about resurrection and immortality, the reason formerly proffered by the Church for its condemnation. Rather, cremation was recognized as a necessity in certain parts of the world for hygienic, and economic reasons, as well as a viable means of providing burial for those who suffer from a severe pathological or psychological fear of burial in the ground or tomb.

The Holy Office stated in the Instruction that the Church's custom of interment is to be retained as usual practice. The former presumption that one chose cremation to protest Church practice was rendered inapplicable. The law allowed the presumption that the choice of cremation had nothing to do with hostility toward the faith unless the contrary is established. Priests were ordered, however, not to accompany the ashes or conduct rites at a crematorium.

The Concilar Decree on Ecumenism, although not specifically concerned with the issues of Christian burial, initiated a subsequent change in the law regarding common worship, thereby addressing the matter of burial rites and the use of cemeteries in cases involving marriages of mixed religions.

The Decree demonstrated a marked shift in the Church's view to-

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26 See 56 ACTA APOSTOLICAE SEDIS, ser. 3, vol. 6, at 822-23 (1964) (De cadaverum crematione).
27 See id. at 823.
28 Id.
ward Christians of other religions.\textsuperscript{29} In the document, the Church gave unprecedented recognition to the bond of unity shared with the separated ecclesial communities, and emphasized Christian unity rather than isolationism. The decree stated that there are visible elements of truth in the separated religions.\textsuperscript{30} Despite the fact that the separated religions differ from the Catholic Church sociologically, psychologically and culturally, the shared belief in Jesus Christ and the baptismal rites present in these churches establish an undeniable bond that the Council believed should be strengthened.\textsuperscript{31} The decree urged the faithful to conduct themselves in a manner that promotes Christian unity and to abandon expressions, judgments and actions that do not characterize the separated brethren with truth and fairness. It further encouraged the faithful to foster communion among the churches and suggested common worship and shared prayer with other Christians in order to realize Christ’s prayer for unity.\textsuperscript{32}

THE POST-CONCILIAR PERIOD

The far-reaching effects of the Conciliar Decree on Ecumenism necessitated communication between the Catholic Church and other Christian religions to explicate the practicalities of the ecumenical approach. Three years after the Decree, the Secretariat for the Promotion of Christian Unity issued a directory on ecumenical matters.\textsuperscript{33} The Directory

\textsuperscript{29} The “ecumenical movement” was described as the group of activities that were started and organized for fostering unity among Christians. \textit{Decree on Ecumenism}, \textit{VATICAN COUNCIL II} 459 (A. Flanneyger ed. 1975). These enterprises included the effort to eliminate words and actions that did not treat the “separated brethren” with truth and fairness, and the establishment of a dialogue between competent experts from different churches and communities. \textit{Id.} at 460-61.

\textsuperscript{30} Aside from the historical, sociological, psychological, and cultural differences among the separated religions, the Council also recognized disparities in the interpretations of revealed truth. \textit{Id.} at 362-63.

\textsuperscript{31} Despite stating that men who believe in Christ and who have been properly baptized are brought into a type of communion with the Catholic Church, the Council still reasoned that it is through the Catholic Church alone that the fullness of salvation can be obtained. \textit{Id.} at 495-96.

The Council declared that when non-Catholic Christians commemorate the Lord’s death and resurrection, it signifies that they live in communion with Christ and that they await his coming in glory. \textit{Id.} at 458. For these reasons, dialogue should be initiated in order to discuss the true meaning of the Lord’s Supper, the other sacraments, and the Church’s worship and ministry. \textit{Id.}

\textsuperscript{32} The Council’s encouragement of common worship and shared prayer was rationalized through its understanding that whatever is truly Christian does not conflict with the genuine interests of the faith. \textit{Id.} at 456. Rather, such actions may result in a fuller realization of the mystery of Christ and the Church. \textit{Id.}

\textsuperscript{33} See \textit{DIRECTORY FOR THE APPLICATION OF THE DECISIONS OF THE SECOND ECUMENICAL COUNCIL OF THE VATICAN CONCERNING ECUMENICAL MATTERS} 1-24 (May 14, 1967) [hereinafter cited as \textit{DIRECTORY CONCERNING ECUMENICAL MATTERS}].
enunciated religious activities with accompanying guidelines to be shared with other members of the separated communities. For example, non-Catholic Christians can be given the sacraments of Eucharist, Penance and the Anointing of the Sick and Dying in time of urgent need, imprisonment or persecution or in situations where they have no access to their own ministers. However, these grants are subject to the restriction that the separated brethren declare their faith in the sacraments in harmony with that of the Catholic Church. The Directory also endorsed the sharing of Catholic buildings, churches and cemeteries with other Christians who lack these facilities. A discretionary power was allocated to the diocesan bishop to determine if the necessary conditions were present for the sharing of spiritual and worldly benefits. These concessions represented a positive sign for solving the pastoral dilemmas accompanying funerals where spouses are members of different religions. This openness appeared to favor the possibility of other Christians benefitting from some portion of Catholic burial rites. Common worship and shared funeral rites and burial places demonstrate, above all else, that all Christians share the same belief in resurrection, immortality and life eternal with one God.

The Holy See later issued a revised rite of funerals for the Latin Church in response to the Conciliar Decree on The Sacred Liturgy. The new funeral rite, for the first time, contained two new Masses for the burial of children: those baptized who died before the age of reason and those who died before baptism. The new rite, however, did not go so far as to provide that the child is redeemed through the faith of its parents, emphasizing that hereditary baptism has no tradition in Catholicism. The prayers of the Mass continued in the Missale Romanum merely acknowledged the faith of the child’s parents and the unfortunate circumstances of the infant’s death before baptism and commended the soul of the child to the merciful God. The term permittere postest would seem to emphasize that Church rites are, in these instances, a matter of Church grace and not a right of the infant. The infants are allowed to be buried with full rites in a manner similar to catechumens.

The issuance from the Holy See included references to cremation, indicating that it remains an acceptable option for Catholics. The penalty of denial of ecclesiastical burial, as legislated in the De Cadaverum

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87 Directory Concerning Ecumenical Matters, supra note 36, at 20. The authors of the Directory reasoned that, because sharing in sacred functions, objects, and places with all the “separated brethren” is permitted under some circumstances, the use of Catholic churches, buildings, and cemeteries may be made available if the other church has no place in which it “can celebrate sacred functions properly and with dignity.” Id.


89 The new funeral rite permitted funerals to be administered in the same manner as others in the region. See id.; Rite of Funerals (U.S. Cath. Conf. Study ed. 1971) at 56 [hereinafter cited as Rite of Funerals].
Crematione, was retained for the rare occasion when anti-Christian sentiments accompany the choice of cremation. Catholics who choose cremation with appropriate motives were to be treated the same as those who choose burial.40

Responses issued by the Holy Office mitigating canon 1240 section one, degree six in reference to public and manifest sinners are germane here. The irregularly married were removed from the listings of notorious and scandalous sinners after requests made by several episcopal conferences and a number of local bishops. Namely, the Church's final rites were no longer to be denied to those faithful who, although in a state of public sin before death, had preserved some attachment to the Church.41 This action harmonizes the Canon Law with social reality, based on a recognition that the denial of church burial was an ineffective deterrent to irregular marriages. The Holy See realized that many of the irregularly married are faithful and practicing members of the Church, and should therefore be accorded some of the Church's privileges.

Following in the spirit of the Conciliar Decree on Ecumenism and the subsequent ecumenical directory, the Holy Office decreed that public Masses for deceased non-Catholic Christians could now be administered upon request.42 The Decree acknowledged the growing custom of people asking their pastors for masses to be celebrated for other Christians who are often spouses of Catholics or public servants of the Church. These Christians were now no longer restricted to prayer in the private sphere as the Code previously demanded. The Decree cautioned that respect should always be paid to those deceased who would not desire a public celebration of Mass; in such circumstances, out of respect for their con-

40 Funeral rites for those who have chosen to have their bodies cremated are now to be celebrated according to the customary plan of the region. See Rite of Funerals, supra note 39, at 6. They must, however, be conducted in a manner "that does not hide the Church's preference for the custom of burying the dead in a grave or tomb . . . ." Id. If no other appropriate place for the funeral rites can be found, they may be performed in the crematory hall itself, provided, however, "that the danger of scandal and religious indifferentism is avoided." Id. at 7.

41 See Ecclesiastical Burial of Catholics in Irregular Marriage (S.C. Doct. Fid., 29 May, 1973, private), reprinted in 8 J. O'CONNOR, CANON LAW DIGEST 862-63 (1973-1977). The Holy See indicated that it would not prohibit the celebration of obsequies for individuals who, although in a situation of "manifest sin," have preserved their attachment to the Church and have evidenced some sign of penitence. Id. at 863. However, the Holy See retained the power to withhold Christian burial rights if the element of scandal accompanied the death of the individual. Id.

42 See Decretum: De Missa publice celebranda in Ecclesia Catholica pro aliis christianis defunctis (S.C. Doct. Fid., reply, 11 June, 1976), reprinted in 68 ACTA APOSTOLICAE SEDIS 621-22 (1976). The Holy See derogated from the general norms of the Canon Law and approved public Masses for deceased Christians of other churches. Id.
Ecclesiastical Burial

sciences a Mass should be denied. Normally, such a request would be made by relatives and friends of the deceased for genuine religious motives. The Decree continued, stating that the grant or denial is a matter to be decided by the bishop, emphasizing that his decision must not present the element of scandal for the faithful. In addition, the name of the separated Christian must not be mentioned in the Eucharistic Prayer, since such innovation presupposes full communion with the Catholic Church. The Decree was a significant step toward ecumenism, because prior to this concession the only Masses permitted for separated Christians were in those instances where the decedent had expressed an intention to convert.

The general conciliar and postconciliar modifications in ecumenical relationships, therefore, set the stage for the subsequent changes in the law regarding separated Christians and their respective inability to receive ecclesiastical burial. The nuanced relationships among the churches made it possible for non-Catholic Christians to share interment in Catholic cemeteries and the sacraments by reason of their affiliation or affinity to Christianity and, most importantly, because their own baptism evokes certain privileges that arise from an imperfect bond to Catholic Christianity.

These initiatives undertaken by the Church followed existing regional and local ecumenical practices. In many areas of the world, Catholic and non-Catholic churches engaged in sharing ministers and priests, church buildings and cemeteries. Concessions were made for unbaptized infants of Catholic parents and for those who committed suicide, thus permitting their interment in Catholic cemeteries. The Conciliar Decree, therefore, provided a uniform basis upon which the Church could actively participate and encourage ecumenical practices among the religious and the faithful. In so doing, it also provided a foundation upon which the revised Code of Canon Law could rest.

The Revision of the Code of Canon Law

The revisions of Book III of the Code of Canon Law were enunciated to include the interim modifications made by the Holy See and the decrees, particularly the ecumenical documents, emanating from the Second

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43 See id.
44 Id.
45 Canon 2262 established that the separated brethren cannot be included in the indulgences, suffrages and public prayers of the Church. Code, supra note 2, Canon 2262, § 1. They were not, however, prohibited from inclusion in private prayers and Masses for the deceased. Id. While living, the separated Christians were only able to participate in these Masses when they were offered for their conversion. Id. § 2, 2°.
The new maxims were incorporated predominantly in the 1977 draft of the proposed new law. The canons contained therein, addressing ecclesiastical burial, were substantially reduced and simplified. The coetus decided that the only rubric under which a person would be deprived of ecclesiastical burial would be public scandal. A sign of repentence remained a means to reverse the imposition of the penalty of denial. Thus, in situations where scandal accompanies the crime, recourse is to be made to the local bishop whose judgment to bestow Christian burial rights is final. If doubt remains, the law favors granting the church burial.

The Pontifical Commission for the Revision of the Code issued to the Cardinal Commission the final schema on the entire corpus of Canon Law during the fall of 1980. The completed legal text included some restructuring and editing of the canons to the 1977 draft, presumably in response to adverse worldwide criticism of the draft by bishops. The 1980 schema did not reach Pope John Paul II for his final review until the spring of 1982. After the official promulgation of the revised Code by the Pontiff on January 25, 1983, it was evident that the 1980 draft dealing with the right of ecclesiastical burial was endorsed in its entirety. Ten canons were devoted to the law of Christian burial, as opposed to forty in

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46 See Pontificia Commissio Codici Iuris Canonici Recognoscendo, 4 Communicationes 161 (1972) [hereinafter cited as 4 Communicationes]. The Commission recognized the determinations made by the Holy See and enunciated four guidelines for the new Code of Canon Law:

1. those canons which referred to liturgical law should be suppressed;
2. with respect to Christian cemeteries and Christian burial, only those general principles which have a true universal value and are pertinent to current society are to remain in the draft of the new Code;
3. canons which are applicable to individual situations and circumstances should be suppressed;
4. the new canons should conform in spirit to the ecumenical decrees emanating from the Second Vatican Council.

47 Id. (translated by author).


49 4 Communicationes, supra note 46, at 165. Rather than listing examples seriatim, the Commission determined that the general criteria of the public scandal would be sufficient and that the Church would endeavor to utilize burial in all cases where the element of scandal is absent. See id.

50 See id.

51 The 1980 schema presented 1,752 revised canons to Pope John Paul II. See Pontifical Commission for the Revision of the Code of Canon Law, supra note 47.

the 1917 Code. Of these, three deal with those persons afforded and those denied ecclesiastical funeral rites.

The new canon law, like the old, is a compilation of natural law, Scriptural imperatives, custom, tradition, and doctrine. It is a means of implementing organization and order and of providing guidance to those confronted with the practical issues of worldly life in a manner that most closely follows the Gospel teachings. It provides the basic principles of justice in the Church. The 1983 Code can be viewed as the last chapter of the work of the Second Vatican Council, and a final synthesis of the juridically protected areas of Church life.

The new law contains the affirmation that the right of Christian burial belongs to all the faithful. In fact, interspersed throughout the new Code is a more positive approach to the rights and duties of the baptized in a manner never envisioned by the drafters of the 1917 Code. The revised body of law is more pastoral in that it recognizes the rights of all Catholics and minimizes the penalties imposed. The 1983 Code emphasizes and judicially protects the right of the faithful to the spiritual benefits of the Church, the sacraments and services of the official ministry, the rights to free assembly and speech in church community, the right to due process, the right to choose one’s spiritual lifestyle, and the right to participate in church life and mission in accordance with one’s status in the community of faith.

In the new Code, reference is made for the first time to the unique service church obsequies render to the deceased as well as to the living. The Church’s time-honored preference for burying the body in a way similar to the Ordo Exsequiarum remains. Nonetheless, the withholding of the right of Christian burial for those opting for cremation now occurs only in those rare instances where it is chosen as a protest against the faith. While the 1977 schema did not include them, the revised law now considers unbaptized infants of Catholic parents as destined for baptism as catechumens. A special Mass is now provided for the particular circumstances that confront these infants. Baptized Christians of other traditions may be allowed Catholic burial rites if they lack their own ministers or if death occurs in emergency situations. Curiously, no express

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58 See id. Canons 1176-85.
59 See id. Canons 1183-85.
60 See id. Canon 1176, § 2. The Church expressly recognized that the concession of burial rights invokes spiritual assistance for the deceased, brings honor to their bodies and brings the solace of hope to the living. Id.
61 See id. § 3.
62 See id. Canon 1183. The canon recognizes that, with respect to funeral rights, catechumens are to be considered as members of the faithful. See id. § 1. Accordingly, the canon authorizes the local ordinary to allow ecclesiastical burial for those individuals if their parents intended baptism but died before the concession of burial rights.
allowances are made for the nonbaptized adult.

Whereas the 1977 schema dropped the detailed listing of delinquents deserving the penalty of denial in Canon 1240 of the 1917 Code, in light of the purely historical value of the offenses, the new law resurrects the listing. Notorious apostates, heretics, and schismatics are retained as those unable to claim the right to church burial, presumably, because the censure for these crimes against faith and unity in the Church is retained. Conceivably, alii peccatores manifesti could still include certain gangsters, mass killers, and other public sinners who are malicious or notoriously unrepentent. Sound discretion must be implemented when judging these kinds of situations, especially when addressing scandal. The level of education and awareness of a given community, its susceptibility to various stigma and its degree of piety must all be weighed. Undoubtedly, Western society is not as susceptible to scandal in the face of certain crimes as perhaps it was in the past.

A CONTEMPORARY ASSESSMENT

The denial of Christian burial is questionable despite its apparent necessity as a penal sanction. The structure of the Church parallels that of civil society in that both are composed of official and societal members, both govern by implementing laws, and both create and maintain goals whose attainment perpetuates social welfare. Where individual actions oppose or frustrate the laws or goals adhered to by the community, both civil and Church society are obligated to respond in a manner that condemns and punishes the actor and designates the action as incompatible with society. The Church has always maintained the power to penalize its members for certain intolerable acts in order to guarantee order, discipline, unity, and the faithfulness of the community. The Church, like civil society, must react to conduct that compromises or abstracts its welfare and mission and the basic rights of its members, or else it will be unable to maintain an orderly existence. Ironically, these penalties are a necessity for the maintenance of an organized entity whose fundamental purpose is redemption and forgiveness.

The crucial question for the Church in each age has been the determination of appropriate penal measures—those effective sanctions that are truly redemptive. In the midst of the current trend of Church renewal, one must question whether the penalty of denial of ecclesiastical burial is truly an efficacious means of assuring the spiritual and moral integrity of the Church.

Historically, the severe penalty of denial commanded the respect and

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67 See id. Canon 1184.
68 See id. § 1, 3°.
approval of the faithful for the power of Church authority, primarily due to the anxiety accompanying the threat of deprivation of holy sacraments and sacramentals at the time of death. Loss of Church final rites was seen as a virtual loss of salvation. Circumstances and attitudes of current society seem to indicate that most of the crimes that are punished by the denial of Christian burial are of historical rather than contemporary relevance. We may well live in an age where the instances of a Christian committing grave moral crimes are rare or involve such a disparate impact upon the Church's communal unity that no need exists for a detailed listing of crimes that are penalized by denial. As unwavering devotion to the Church is no longer the predominant attitude among the faithful, the refusal to give someone Christian burial rites is apt to produce hostility and defections from the faith when people perceive the Church as departing from its merciful mission.

There are several good reasons to believe that Christian burial should never be fully denied to a Catholic in American culture:

(1) Attitudes have changed noticeably. We live in a time where the faithful, by and large, are better educated and consequently are quite aware of their basic rights in both civil and ecclesiastical spheres. The docile Church member who allows himself to be subjected to facile and capricious judgments has been replaced by individuals who are aware of and aggressively assert their individual rights.

(2) The emotions associated with the loss of death are unique and sensitive. Acceptance by the bereaved individuals of the appropriateness of denial for relatives or friends is bound to be unsuccessful. In a former period, people became embittered at certain decisions made by authority but nonetheless remained in the Church. Today, they become embittered and leave the Church with little, if any, regret. The Church is therefore confronted with the problem that if it denies Church burial it may estrange itself from an even greater number of the faithful. Even though the deceased may be unworthy, refusal to grant the Church's final suffrages may be interpreted as a label of public unworthiness laid against not only the deceased, but the innocent family members who may not be sympathetic to the delinquent or his or her crime. Granting Church burial to one engaged in open hostility to the Church would portray the Church as a forgiving and merciful entity which regrets that this reconciliation did not occur prior to the offender's death.

(3) A spirit of pluralism, individualism and the fluidity of Church membership pervades the American social structure. There is no longer a social necessity to belong to the Church or to abide by its rules. People belong to the Church today, for the most part, because they desire the human rewards and support that derive from shared faith and belief in the Church's sacraments. Thus, the current members of the Church would not be the appropriate parties upon which to levy the sanction.
(4) There was a time when funeral rites held at a funeral home, or before a Protestant minister, or in a cemetery or nondenominational chapel were looked at askance by the faithful. Today, however, many people will likely take refuge at these places without regret in the face of refusal by their own priests. Our Christian culture places high value on a religious funeral with the usual trappings. In American society, it is appropriate to have some religious official presiding at a funeral. For those unable to secure their own priests, any minister will suffice.

Given these marked shifts in the sensus fidelium regarding personal rights and the coercive authority of the Church, and the attitudinal changes that are a consequence of the current ecumenical climate and the renewal of Canon law, the denial of Christian burial even to the worst sinners is an ineffective means to secure control of divergent behavior or to guarantee unity and faith in the Church.

The denial of ecclesiastical burial, therefore, is too severe a sanction for today's faithful. Rather than fostering adherence to Christian tenets and encouraging spiritual growth of the individual members of the Church, denial promotes separatism and general disenchantment with the Christian religions. Current social attitudes toward religion necessitate a more pastoral means of propagating the faith. An offender's bond with the Church, and therefore with God, is created at baptism and remains throughout that individual's lifetime, despite the offenses committed therein. The ultimate sentence placed upon the offender should remain a matter of Divine judgment. Penalties and penance should be levied against the individual where actual reformation of deviant lifestyles may occur. The utilization of denial as an in terrorum mechanism is an inefficient means of fostering Christian dogmas and is viewed as incompatible with the fundamental principles of Christianity. It is suggested that its abolition as a sanction is therefore warranted.

Alternatives exist to the current practice of denial of ecclesiastical burial when the crime involves an element of scandal. Christian burial may be accorded to those who have committed egregious or scandalous offenses against the Church in a manner that is particularized for the offense committed. Consideration, therefore, could be given to those lay persons who would be most offended by a complete denial. The concomitant discouragement of the pious would be absent because of the consideration given to them prior to the imposition of denial. A concerted effort oriented at instructing the faithful that Christian burial is not a reward for a good Christian life, but, rather, the Church's offering of the final prayers for the sinner and a sharing in the creedal celebration of resurrection, redemption and God's mercy would reorient the perspective of the faithful and the religious, thereby facilitating the access of Christian burial to the innocent and guilty alike.

These novel approaches would enable the Church to grant final rites
to those guilty of notorious and premeditated crimes against both civil and religious societies without any danger of presenting the image of indifference about the effect of such crimes upon the community. The celebration of the Eucharist and the funeral rite in these exceptional situations may or may not be appropriate; the surrounding situations, the degree of faith of the deceased and of the bereaved acquaintances, and the public sentiment toward the individual and his actions all must be weighed. Decisions as to which elements of the Christian burial rite are appropriate for public and manifest sinners can be made by dialogue between the bishop or pastor and the next of kin and other concerned individuals. It is suggested that no abridgment of rites should be made without this necessary consultation. This renewed approach would solve three remaining difficulties with the problem of denial. It would provide an effective treatment for the repentant scandalous offender, it would provide a means to console the bereaved who were not sympathetic to the crime, and it would discourage disparate judgments of bishops in various communities with respect to the granting of burial rites. Most importantly, the renewed approach would convey the image of the Church as merciful and forgiving, thus fulfilling its worldly mission.

As the denial of Christian burial is retained in the law, canon 1184 apparently represents the Church's attitude that the crimes mentioned are considered to be the most intolerable offenses in the modern Church. Reemphasizing the Church's right to enact penal sanctions against those among the faithful who have violated a law or precept or who have committed scandalous crimes, the revised law also emphasizes that penalties should be used as a last resort when all other pastoral methods of persuasion have failed. In other words, the grave penalty of denial of Christian burial should not be administered capriciously. Whereas more objective criteria clarifying the nebulous meaning of notoriety, scandal and repentance might check arbitrary judgments of pastors regarding public criminals and sinners, the new Code refrains from any such specification. Diocesan bishops will have to establish certain standards to assure uniformity in applying these laws due to the discretionary power accorded them. The severity of the penalty of the denial of ecclesiastical burial maintained as a means of Church discipline warrants a strict review standard where the deprived may be assured of justice before both God and His Church.