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ARTICLES

FUNERAL POVERTY

Victoria J. Haneman *

INTRODUCTION

Death is an expensive proposition.¹ The economics of life do not end with death, and putting the deceased to rest carries (often unexpected) funerary expenses for cremations, funerals, burials, and/or memorials. In 2019, the median cost of an adult funeral with viewing and burial exceeded \$9000.² This number is particu-

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1. “Death is expensive, Miss Stella!” speaks character Blanche DuBois. TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* sc. 1.

2. Excluding cemetery costs, the median cost of an adult funeral with viewing and burial was \$7640 and the median cost of an adult funeral with viewing and cremation was \$6645. *2019 NFDA General Price List Study Shows Funeral Costs Not Rising As Fast As Rate of Inflation*, NAT’L FUNERAL DIRECTORS ASS’N (Dec. 19, 2020), <https://www.nfda.org/news/media-center/nfda-news-releases/id/4797/2019-nfda-general-price-list-study-shows-funeral-costs-not-rising-as-fast-as-rate-of-inflation> [<https://perma.cc/8NCY-4Y8R>]. The cost of an adult funeral and cremation *without* a cremation casket or urn is \$5150. Cemetery costs vary dramatically based upon location. It is estimated that the average American funeral with burial comes exceeds \$9000. CYNTHIA WILLIAMS RESOR, *DISCOVERING QUACKS, UTOPIAS, AND CEMETERIES: MODERN LESSONS FROM HISTORICAL THEMES* 106 (2019); *see also* Lisa Dingman, *Rest in Peace: 10 Expensive Locations to Lay Down the Dead*, *THERICHEST* (Jan. 4, 2014), <https://www.therichest.com/most-expensive/rest-in-peace-10-expensive-locations-to-lay-down-the-dead/> [<https://perma.cc/N395-WQ95>] (noting that in 2009, Westwood Village Memorial Park in Los Angeles sold a crypt on eBay for \$4,602,100).

larly stark given that four out of ten Americans would have difficulty covering an unexpected \$400 expense, and 12% would be unable to pay the unexpected \$400 by any means.³ Although there are ways in which the consumer may mitigate cost, planning for a funeral or burial is expensive and complicated, and the consumer is frequently inexperienced and vulnerable.

For the average consumer, funerary expenses⁴ will be the third-largest category of expense incurred over a lifetime⁵—and notably, this category of expenditure is often managed during an emotionally fraught time when the consumer may be cognitively impaired.⁶ A grief-stricken consumer is not a rational actor. This consumer is not price sensitive and is generally aware of only those prices and options⁷ made available by the first funeral home consulted.⁸ And though pre-need planning and prepayment would facilitate informed decision-making and purposeful saving, the options for pre-need prepayment are severely limited, with disadvantages that frequently outweigh benefits.⁹

3. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 21 (2020) [hereinafter FED REPORT].

4. As used in this Article, “funerary expense” is interchangeable with “death service expense” and refers to expenses arising in any one of five primary areas: (1) funeral homes, (2) pre-need sales, (3) third-party vendors of goods, (4) crematories, and (5) cemeteries. Steven W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 J. CONSUMER AFF. 150, 151 (2007).

5. The third-largest expense after home and automobile purchase. Steven W. Kopp & Elyria Kemp, *Consumer Awareness of the Legal Obligations of Funeral Providers*, 41 J. CONSUMER AFF. 326, 326 (2007). The price for funerals and burials in the United States has risen 227.1% from 1986 to 2017, as compared to 123.4% for all consumer items. BUREAU OF LABOR STATISTICS, *The Rising Cost of Dying, 1986–2017*, U.S. DEPT’ LAB. (Oct. 31, 2017), <https://www.bls.gov/opub/ted/2017/the-rising-cost-of-dying-1986-2017.htm> [https://perma.cc/9GLY-YQHJ].

6. See Natasha Bernal, *Would You Be Buried in a Fungus Suit? Tech’s Making Funerals Weird*, WIRED (Jan. 8, 2020), <https://www.wired.co.uk/article/funeral-directors-technology> [https://perma.cc/A9V6-W6PL] (stating that, in the U.K., “[T]he average family falls into £1,600 debt to cover funeral costs, often taking payday loans to cover the expense.”).

7. *Id.* (“Your funeral director won’t tell you a green burial will save you two-thirds of the cost, or that the expensive shiny brass coffin handles you paid extra for will be thrown in a tub and sold as scrap metal . . .”).

8. Kelli B. Grant, *Amid the Tears, Don’t Overpay for Funeral Costs*, CNBC (Sept. 27, 2016, 1:57 PM), <https://www.cnbc.com/2016/09/22/comparison-shopping-funeral-costs-can-yield-big-savings-.html> [https://perma.cc/6G5E-LKEM] (noting that this behavior is unusual for a large purchase; “[m]ost people go to the same funeral home their family has always used, and just say ‘yes’ to everything . . .”).

9. See, e.g., Ron Burley, *Prepaid Funerals: A Grave Error?*, AARP, <https://www.aarp.org/money/scams-fraud/info-12-2011/prepaid-funerals-grave-error.html> [https://perma.cc/Z9F-ZVD6].

It is important to consider the way in which unremarkable, mundane, unconsidered expenses perpetuate inequality and contribute to intergenerational cycles of poverty, and this issue has been heretofore relatively unexplored by the legal academy in the context of death service expenses.¹⁰ And though the topic of funeral poverty is rarely discussed in the United States, it has been a trending issue in many other parts of the world.¹¹ In the United Kingdom,¹² it was raised before Parliament.¹³ In South Africa, economists found that the households studied between 2003 and 2005 spent an average of a year's income (measured at median per capita African income) for an adult's funeral, leaving poor households in a state of extreme hardship.¹⁴ Scotland implemented a funeral expense assistance program with eligibility for those with low incomes, with an average subsidy of £1372 in 2017/2018.¹⁵ And notably, the Swedish have preempted the need to have any conversation: all residents are entitled to burial services and charged a mandatory scaled fee for expenses on the resident's annual tax statement,

10. Noting the "majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread," Anatole France illustrates that the law, though equal in applicability, imposes disparate burdens on the rich and the poor. ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens trans., 6th ed. 1922) (1894).

11. See, e.g., *What Is Funeral Poverty?*, FAIR FUNERALS CAMPAIGN, <https://fairfuneralscampaign.org.uk/content/what-funeral-poverty> [<https://perma.cc/QJF9-RA5V>] ("Funeral poverty is where the price of a funeral is beyond a person's ability to pay.")

12. Bridget McCall, *Funeral Poverty: Speaking Truth to Power*, TURN2US (Feb. 12, 2019), <https://www.turn2us.org.uk/About-Us/News/Funeral-poverty-Speaking-truth-to-power> [<https://perma.cc/CY7V-HPSW>] (noting the 2014 Fair Funerals campaign pushed for a politically coordinated approach to tackle the issue of funeral poverty, which brought about the Work and Pensions Select Committee's 2016 inquiry into the issue; an initiative that called for standardized pricing format for funeral costs (with pricing caps)).

13. Harriet Sherwood, *Church of England Could Seek to End Paupers' Funerals*, GUARDIAN (Jan. 26, 2020), <https://www.theguardian.com/society/2020/jan/26/church-of-england-could-look-to-end-paupers-funerals> [<https://perma.cc/B2PD-PFBQ>] ("[T]he Labour MP Emma Lewell-Buck told the Commons in 2018: 'Around a quarter of families that cannot afford funerals borrow from friends or relatives, a quarter put costs on a credit card, and the rest take out loans or work out an instalment plan with funeral directors. Some even sell their belongings. It has been revealed recently that people are increasingly turning to crowdfunding websites to raise money for funerals.'")

14. Anne Case, Anu Garrib, Alicia Menendez & Analia Olgiati, *Paying the Piper: The High Cost of Funerals in South Africa*, 62 *ECON. DEV. & CULTURAL CHANGE* 1, 2 (2013).

15. See generally *The Funeral Expense Assistance (Scotland) Regulations 2019*, (ASP 292); *Funeral Expense Assistance*, GOV.SCOT (Jan. 18, 2019, 12:17 PM), <https://www.gov.scot/news/funeral-expense-assistance/> [<https://perma.cc/B3MA-MHXH>] (noting these payments have three elements: (1) cost of burial or cremation, (2) flat rate payments for other funeral expenses such as flowers, and (3) some transport costs).

with financial assistance (if needed) from the municipal social services office.¹⁶

In the United States, we are extraordinarily distanced from death and have largely moved the process from home to institution.¹⁷ After the Great Depression and World War II, life expectancy increased and death became taboo.¹⁸ Modern society shifted death out of sight and mind, railing against aging, whisking the dying to hospitals, removing the deceased to funeral homes, and purchasing meat for consumption.¹⁹ This sheltering from the organic and necessary end of the life cycle has created a “death illiteracy” that renders the consumer particularly vulnerable to foolish decision-making and exploitation while planning a funeral and/or burial.²⁰ Important conversations about end-of-life planning, the responsibility to pay for one’s own funerary expenses, the notion of planning for inexpensive, simpler options, and meaningfully addressing funeral poverty are all ideas generally without traction in the United States. The consumer cloaks himself in the illusion of immortality and end-of-life planning threatens that illusion.²¹

This Article makes a unique contribution to the literature by drawing attention to the financial burden of death service being shouldered by those who are “relatively poor,” or those for whom everyday life may be a financial struggle.²² The thesis is equal

16. See *About Funerals in Sweden*, SWEDEN’S AUTHORIZED FUNERAL SERV., <https://www.begravningar.se/about-funerals-sweden> [<https://perma.cc/U2FV-DJAS>]. See generally SVENSKA KYRKAN [CHURCH OF SWEDEN], OM BEGRAVNING [ABOUT FUNERALS, BURIALS AND CREMATIONS] (2d ed. 2013), <https://www.svenskakyrkan.se/Sve/Binärfiler/Filer/Om%20begravning%20engelska.pdf> [<https://perma.cc/C9BM-3YXQ>]. The average cost of a funerary service in Sweden is SEK 25,000 (as of 2014), which is equal to U.S. \$2669.

17. COMM. ON CARE AT THE END OF LIFE, APPROACHING DEATH: IMPROVING CARE AT THE END OF LIFE 39 (Marilyn J. Field & Christine K. Cassel eds., 1997).

18. See Sara Marsden-Ille, *Funeral Poverty in the 21st Century*, U.S. FUNERALS ONLINE (Oct. 29, 2014), <http://www.us-funerals.com/funeral-articles/funeral-poverty-in-the-21st-century.html> [<https://perma.cc/28BA-KEQS>].

19. See Jen Ortiz, *The Women Who Love Death*, MARIE CLAIRE (Oct. 31, 2016), <https://www.marieclaire.com/culture/a22236/women-in-death-positivity-movement/> [<https://perma.cc/EH56-9EGY>] (“Without a regular face-to-face relationship with death, we’ve developed an aversion to the subject entirely.”).

20. See Sarah Chavez, *The Story of Death Is the Story of Women*, YES! (Aug. 22, 2019), <https://www.yesmagazine.org/issue/death/2019/08/22/dying-feminist-funeral-women-caitlin-doughty/> [<https://perma.cc/4GCS-RVR5>].

21. Marsden-Ille, *supra* note 18 (“When I started 40 years ago people were more aware of their own mortality. People had their own policies, people had insurance or they put money aside. They understood that they were going to die. I don’t know if we are wrapped up in immortality, but people don’t think about it now.”).

22. As compared to a discussion of those who are the absolute poor, which is “a grim

parts positive, normative, descriptive, and prescriptive: it is imperative that options be made available to transition human remains in a way that does not exacerbate cycles of poverty and allows for the living to preserve dignity.²³ This need calls for important changes to existing legal structures, including modernization of consumer protection regulation, change to laws regulating the death service industry, and recharacterization of expenses for tax purposes. An overview of the death industry in the United States is explored in Part I, as a discussion of casket versus cremation as the path most followed. Part II traces the underlying economics of “shuff[ling] off this mortal coil” in the United States, and the limited options (beg, borrow, surrender) that are available to assist the struggling consumer.²⁴ The structure of any marketplace influences consumption, and Part III considers gaps in marketplace regulation that highlight or exacerbate structural features such as uncertainty of need, information asymmetry, vulnerability of the consumer, and inelasticity of the marketplace. Part IV considers the multifaceted issue of funeral poverty and the potential long-term implication of these extraordinary expenses upon families. The Article concludes with a cohesive framework of solutions responsive to the unique structural features of the death services marketplace, by which funeral poverty issues may be comprehensively addressed in the United States.

reality for those living in the so-called ‘developing world,’ where daily suffering and death, as a result of malnutrition, diseases contracted through exposure to contaminated water, and conflict, are commonplace.” Caroline Squire & Kate H. Beverley, *Women, Poverty and Childbirth*, in *THE SOCIAL CONTEXT OF BIRTH* 41 (Caroline Squire ed., 2d ed. 2009). The relatively poor find themselves economically excluded from participation in various aspects of life enjoyed by the majority, with such exclusions being accompanied by varying levels of shame and powerlessness that are often not insignificant. *Id.* The relatively poor suffer (sometimes small) deprivations because of economic insecurity—perhaps lacking safe or adequate housing or healthy food. *Id.*

23. See, e.g., Corey Williams, *Paying for Funerals Impossible for Many Poor Families*, ABC NEWS (Jan. 20, 2019, 11:31 AM), <https://abcnews.go.com/US/wireStory/paying-funerals-impossible-poor-families-60505937> [<https://perma.cc/4HHG-ZGTK>]. (“People who can’t afford [funerals] . . . may simply abandon relatives’ remains altogether, leaving it to coroners and funeral homes to pay for cremation and disposal.”)

24. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1 (“Devoutly to be wish’d. To die, to sleep; To sleep, perchance to dream . . . For in that sleep of death what dreams may come, When we have *shuffled off this mortal coil*, Must give us pause, there’s the respect, That makes calamity of so long life.” (emphasis added)).

I. MODERN FUNERARY PRACTICE IN THE UNITED STATES

Death was an everyday part of life for Americans prior to the Civil War. Infant mortality rate (“IMR”) was over 100 per 1000 live births, and life expectancy did not extend far beyond one’s late thirties.²⁵ Families would prepare their own deceased, and home funerals were a norm.²⁶ A funerary cultural shift occurred because of the Civil War, when over 600,000 men died on the battlefield and families wanted the remains of the dead soldiers shipped home.²⁷ Embalming became necessary for preservation of those not immediately laid to rest, and it required a set of specific skills that gave rise to an entire profession.²⁸ American funeral custom shifted from modest home funerals²⁹ to more costly professionally organized events at full-service funeral homes.³⁰ Part I of this Article provides an overview of modern burial and funeral practice in the United States, as well as the choice between casket or cremation.

A. *Modern Burial and Funeral Custom*

In the United States, traditional modern funeral and burial practice varies dramatically based upon religious preferences. Burial has been the normative path for those of Christian faiths,

25. See generally Clayne L. Pope, *Adult Mortality in America Before 1900: A View from Family Histories*, in STRATEGIC FACTORS IN NINETEENTH CENTURY AMERICAN ECONOMIC HISTORY 267, 267, 276–77 (Claudia Goldin & Hugh Rockoff eds., 1992) (noting American IMR’s dramatic decrease from “above 100 per thousand at the turn of the century to the current level of about 10 per thousand” as of 1992). As to adult mortality rates, “[t]he Civil War years were marked by very high mortality rates for both men and women.” *Id.* at 281.

26. Funeral preparations in the 19th Century consisted of women caring for the body while the men dug the grave. Maggie Jones, *The Movement to Bring Death Closer*, N.Y. TIMES, Dec. 19, 2019, (Magazine), <https://www.nytimes.com/2019/12/19/magazine/home-funeral.html> [<https://perma.cc/2VUG-SCPA>]. Loved ones would sing songs and pray at the bedside of the deceased, “while the children came and went, unshielded from the inevitability of death and decay.” *Id.*

27. See *id.*

28. Vanessa Quirk, “We’ve Mastered Weddings—But the Funeral Needs a Lot of Work”: Inside the New Death Industry, QUARTZ (Apr. 4, 2017), <https://qz.com/948857/funeral-homes-and-the-death-industry-are-undergoing-radical-shifts-toward-diy-death/> [<https://perma.cc/K99Q-GHRE>].

29. *Id.* (“By the 1920s, more and more people lived in small urban apartments and died in hospitals. As a result, the funeral home started to become a more popular option for paying respects to the dead.”)

30. David Foos, *State Ready-to-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*, 2012 MICH. ST. L. REV. 1375, 1376.

though some churches will make allowances for cremation, and funeral attendees customarily wear black.³¹ Cremation is preferred for Buddhists, with funeral attendees customarily wearing white.³² Jewish people generally prefer not to be cremated, and a Jewish burial is a unique combination of custom (“minhag”) and commandment (“mitzvah”).³³ The deceased is usually interred in a simple wood box as soon as possible after death.³⁴ Similarly, Muslim traditions also require that the decedent be buried as soon as possible after death.³⁵ Those who are unchurched and highly secular (roughly one-third of the nation’s adult population)³⁶ may opt for a secular or non-religious event that focuses on a celebration of life.³⁷

Though function and form of the funerary process varies because of religious affiliation or lack thereof, it is useful to consider the process as having three distinct stages: the pre-funeral phase, the funeral phase, and the burial site phase. The pre-funeral phase usually involves a visitation, viewing, or wake that takes place prior to the funeral. The visitation, viewing, or wake provides an

31. See Joe Carter, *The FAQs: What Christians Should Know About Cremation*, GOSPEL COALITION (Sept. 20, 2017), <https://www.thegospelcoalition.org/article/the-faqs-what-christians-should-know-about-cremation/> [<https://perma.cc/L83R-MUUJ>] (“For Christians, burial is not the disposal of a thing. It is caring for a person.”); see also Timothy George, *Cremation Confusion: Is It Unscriptural for a Christian to Be Cremated?*, CHRISTIANITY TODAY (May 21, 2002), <https://www.christianitytoday.com/ct/2002/may21/27.66.html> [<https://perma.cc/9RMF-FQMC>] (“As Jesus himself was buried and raised bodily from the dead, so Christians believed that their burial was a witness to the resurrection yet to come.”). Traditional black funeral garb remains commonplace in American society. See, e.g., Andre Lambertson, *Sometimes Miracles*, 86 VA. Q. REV. 133, 134 (2010) (lamenting the frequency of youth funerals in inner-city Baltimore, observing, “[Y]oung people in [the] neighborhood had grown accustomed to seeing death’s face up close. Visiting their friends in funeral homes had become a macabre social outing—just one more party to dress up for, another occasion to wear black.”).

32. See BUDDHIST FUNERAL CULTURES OF SOUTHEAST ASIA AND CHINA 27, 79, 88 (Patrice Ladwig & Paul Williams eds., 2012).

33. *Religious Traditions: Judaism Funeral Customs*, FUNERAL SOURCE, <https://thefuneralsource.org/trad0203.html> [<https://perma.cc/C4DC-KMG2>].

34. See, e.g., *Jewish Funerals Guide*, BURIALPLANNING.COM, <https://www.burialplanning.com/resources/religious-funerals-guide/jewish-funerals-guide/> [<https://perma.cc/6NX6-WL9P>].

35. Rema Rahman, *Who, What, Why: What Are the Burial Customs in Islam?*, BBC NEWS (Oct. 25, 2011), <https://www.bbc.com/news/magazine-15444275> [<https://perma.cc/3Q36-LSXV>].

36. *Five Trends Among the Unchurched*, BARNA (Oct. 9, 2014), <https://www.barna.com/research/five-trends-among-the-unchurched/> [<https://perma.cc/XK6E-8HJV>].

37. Olivia Waring, *What Is a Humanist Funeral? Dale Winton to Be Laid to Rest at Non-Religious Service*, METRO (May 22, 2018, 1:03 PM), <https://metro.co.uk/2018/05/22/humanist-funeral-dale-winton-laid-rest-non-religious-service-7568038/> [<https://perma.cc/7UHV-5FVU>].

opportunity for the attendees to approach the deceased to say good-byes and pay respects to survivors.³⁸ In some cultures, a wake is a lighthearted, uproarious celebration of life.³⁹ While wakes may be held in a residence or funeral home, visitations and viewings are generally held in a funeral home and can be somewhat more somber than a wake.⁴⁰ When the deceased is displayed for viewing, the remains have usually been preserved through an embalming process and cosmetics have been applied.

The funeral phase often involves a funeral service that takes place either at a funeral home or a religious facility. A funeral is a formal ceremony that is connected to the disposition of human remains, and unlike a memorial service, the remains are usually present.⁴¹ These ceremonies are generally intended to honor the deceased and involve religious rites or prayers. It is common for specially selected pallbearers to be honored with the task of carrying the casket from the funeral service to the vehicle that will be leading the procession either to the burial site or the crematorium.

In the burial site phase, the procession of mourners may travel from the location of the funeral to a designated burial site—which may take the form of a grave, tomb, or mausoleum in a cemetery.⁴² If the deceased was cremated following the funeral, the cremated remains or “cremains” may be brought at some later time by loved ones to a cremation niche, bench, or mausoleum.⁴³ It is common for

38. *History and Customs*, NAT'L FUNERAL DIRECTORS ASS'N, <https://www.nfda.org/consumer-resources/why-a-funeral/history-and-customs> [<https://perma.cc/Z78Q-GC32>].

39. For example, “lift the corpse” is one of the most popular games frequenting Irish wakes. Brian O'Connell, *Lifting the Lid on Irish Wakes*, IRISH TIMES (Mar. 25, 2009), <https://www.irishtimes.com/culture/lifting-the-lid-on-irish-wakes-729881> [<https://perma.cc/HT9Z-WP56>]. “[L]ifting the corpse’ involve[s] a stout man lying on the floor and attempting to lift a body representative of the corpse.” *Id.* (noting the 20th Century’s resurgence of Irish funeral games, as the comedic customs continue their comeback).

40. *Wake vs. Viewing vs. Funeral: What’s the Difference?*, BURIALPLANNING.COM, <https://www.burialplanning.com/resources/funeral-etiquette-guide/wake-vs-viewing-vs-funeral-whats-the-difference/> [<https://perma.cc/BUS4-ANG2>].

41. *See id.*; *see also* Curtis Rostad, *The Basics of Funeral Service*, IND. FUNERAL DIRECTORS ASS'N, <https://www.indiana-fda.org/the-basics-of-funeral-service> [<https://perma.cc/YPQ7-9VF6>] (affirming the presence of remains at funerals as a means to “confirm the reality . . . of death”).

42. *See* HAL HASSEN & DAWN COBB, *CEMETERIES OF ILLINOIS: A FIELD GUIDE TO MARKERS, MONUMENTS, AND MOTIFS* 95–97 (2017).

43. ROBERT KASTENBAUM, *ON OUR WAY: THE FINAL PASSAGE THROUGH LIFE AND DEATH* 278 (2004) (“Throughout North America most cremains are either delivered to the cemetery (41 percent) or taken home (36 percent), where they will have various dispositions: kept at home, buried elsewhere, placed in a columbarium, or scattered.”).

a reception or gathering (which may involve food and beverages) to be held as the conclusion of the burial site phase.

B. *Casket Versus Cremation*

Human remains in the United States generally take one of three paths—casket, crematorium, or medical donation.⁴⁴ Burial was the normative path in the United States until 2015, when the preference flipped to fire-based cremation.⁴⁵ Developed as a practice roughly 5000 years ago,⁴⁶ the popularity of cremation has increased dramatically in the United States only within the past two decades, with rates rising from 5% in 1970⁴⁷ to more than 50% today.⁴⁸

This shift in consumer preference makes sense: more people are unchurched (only 36% regularly attend religious services)⁴⁹ and environmentally aware, and fewer people have an interest in visiting

44. Brendan Kiley, *The Architect Who Wants to Redesign Being Dead*, INSURANCENEWSNET (Apr. 1, 2015), <https://insurancenewsnet.com/oarticle/The-Architect-Who-Wants-to-Redesign-Being-Dead-a-609801> [<https://perma.cc/LL85-R436>].

The American dead, like American voters, fall roughly into two camps. In this . . . analogy, the conventional burial industry is like the Republican Party: a lot of suits, a lot of money, lobbyists to protect their interests, and a general acceptance that cutting down trees (for caskets), pouring concrete (for vaults), and putting toxic chemicals underground (embalming fluids) are simply part of the American way. Cremationists are more like the Democratic Party: slightly looser dress code, still interested in profit margins but perhaps not as fanatically (there is a lot less money to be made from a \$400 urn than a \$3000 casket), and a belief that they are on the progressive side of history.

Id.

45. Josh Sanburn, *Cremation Is Now Outpacing Traditional Burial in the U.S.*, TIME (Aug. 1, 2016, 6:00 AM), <https://time.com/4425172/cremation-outpaces-burial-u-s/> [<https://perma.cc/4FQV-QGKX>].

46. Michael Strasburg, *The Rise of Cremation Has Turned the Funeral Industry Upside Down*, SW NEWS MEDIA (Oct. 7, 2019), https://www.swnewsmedia.com/jordan_independent/news/business/the-rise-of-cremation-has-turned-the-funeral-industry-upside-down/article_8a42c21c-900d-5601-9e81-3933a0ca2b57.html [<https://perma.cc/ST4C-3ZL6>].

47. See Leanne Pott, *6 Funeral Trends That Are Changing Death Rituals*, AARP (Nov. 20, 2017), <https://www.aarp.org/home-family/friends-family/info-2017/funeral-ceremony-trends-fd.html> [<https://perma.cc/WJE2-W55Y>].

48. Antonia Blumberg, *Americans Are Opting for Cremation over Burial at the Highest Rate Ever*, HUFFPOST (July 28, 2017, 5:58 PM), https://www.huffpost.com/entry/american-cremation-rate_n_597b7e9ce4b02a4ebb755bb9 [<https://perma.cc/UK7L-LQFW>].

49. Karen Heller, *The Funeral as We Know It Is Becoming a Relic—Just in Time for a Death Boom*, WASH. POST (Apr. 15, 2019, 5:00 AM), https://www.washingtonpost.com/lifestyle/the-funeral-as-we-know-it-is-becoming-a-relic-just-in-time-for-a-death-boom/2019/04/14/a49003c4-50c2-11e9-8d28-f5149e5a2fda_story.html [<https://perma.cc/ZTT9-DGLT>].

gravesites.⁵⁰ The unchurched are less concerned about religious restrictions historically placed on cremation.⁵¹ Further, cremation has become increasingly accepted by religious organizations.⁵² It is a less burdensome process both from an economic and an environmental perspective, in that it foregoes embalming, a casket, or a burial plot.⁵³ And as Americans become increasingly mobile and geographically dispersed, family burial plots and hometown cemeteries hold less of a draw.⁵⁴

II. THE FINANCIAL BURDEN OF DEATH: BEG, BORROW, SURRENDER

The unaffordability of disposal of human remains is a topic that is seldom considered, discussed, or researched—with the term “funeral poverty” only recently being coined to draw awareness to important economic implications.⁵⁵ It is a particularly relevant subject to consider when the state itself plays a dominant role in imposing an economic burden through state laws that may require

50. *See id.*

51. *See, e.g.,* Josh Nathan-Kazis, *More Jews Opt for Cremation*, FORWARD (June 27, 2012), <https://forward.com/news/158218/more-jews-opt-for-cremation/> [<https://perma.cc/XU5Q-6QMF>] (noting that cremation remains taboo among most Jews, but one Jewish funeral professional reports that roughly 10% of the funerals he handles involve cremations).

52. *Id.* (“Cremation remains taboo among most Jews, even in the non-Orthodox denominations. No hard numbers on the practice exist. And conversations with Jewish funeral professionals from across the country suggest that the proportion of Jews who choose cremation varies widely by city. But almost all . . . agree the general trend is up. . . . Joe Levine, of [one of Philadelphia’s] major Jewish funeral home[s], Joseph Levine & Sons, said that roughly 10% or 11% of the funerals he handles are cremations.”).

53. *See* Blumberg, *supra* note 48; Pott, *supra* note 47.

54. *See* Blumberg, *supra* note 48; Pott, *supra* note 47.

55. Within growing awareness of problems paying for funerals has emerged a concept of “funeral poverty.” The term seems to be a relatively recent construct, probably emerging around five years ago as part of a focus on problems with the Social Fund Funeral Payment. . . .

The concept of “funeral poverty” is thus used in a number of contexts encompassing poverty and financial hardship, indebtedness, welfare reform, use of food banks, constraints on and challenges for the funeral industry, the experience of grief, and provision of bereavement services and support. Within these various contexts are different perspectives and emphases. But there is no definition of “funeral poverty” or general agreement on what it means.

Anne Corden & Michael Hirst, *The Meaning of Funeral Poverty: An Exploratory Study* 3–4 (Univ. of York Soc. Policy Research Unit, Working Paper No. WP 2668, 2015), <https://www.mariecurie.org.uk/globalassets/media/documents/policy/policy-publications/march-2016/meaning-of-funeral-poverty-exploratory-study.pdf> [<https://perma.cc/GK34-GAU2>].

that families become customers of the funeral industry.⁵⁶ Research done by the Federal Reserve shows that 40% of Americans would have great difficulty covering an unexpected \$400 expense.⁵⁷ What do the poorest among us do when a loved one dies? What resources are available to assist low-income or middle-income families who may be unable to pay? Part II considers the options available to those who are financially unprepared to shoulder the disposition costs of a deceased loved one.

An enduring myth is that medical donation of remains is an option for anyone who is unable to afford death care service. Cadavers are needed for medical education and research,⁵⁸ these programs rely upon goodwill donations, and so the institution accepting the donation agrees to cover cremation costs when the cadaver is no longer needed.⁵⁹ The reality is that there are broad disqualifications to donate remains and this is not a viable option for many Americans. Bars to donation instituted by medical schools and nonprofit institutions include (1) donors who have suffered trauma (e.g., car accident, limb amputation, etc.); (2) donors who died because of an infectious disease; (3) a donor with a body mass index above 35;⁶⁰ and (4) some programs restrict height and weight in terms of absolutes (e.g., over six feet tall and 200

56. Nine states require families to become customers of a funeral director: Connecticut, Illinois, Iowa, Indiana, Louisiana, New York, Michigan, Nebraska, and New Jersey. *See, e.g.*, TANYA MARSH, *THE LAW OF HUMAN REMAINS* 74 (2015); *cf.* Brandon Heffinger, *Only Nine States Require the Use of Funeral Directors*, FUNERAL L. BLOG (Mar. 3, 2014), <https://funerallaw.typepad.com/blog/2014/03/only-nine-states-require-the-use-of-funeral-directors.html> [<https://perma.cc/4KTD-YS27>] (describing process differences absent a funeral director requirement, noting, “[i]n states like North Carolina, citizens can bury their recently deceased loved ones without much oversight or regulation.”).

57. FED REPORT, *supra* note 3, at 21 (noting that four in ten adults, if faced with an unexpected expense of \$400, either would not be able to cover it or would cover it by selling something or borrowing money).

58. *See* Alex Mar, *Rent-a-Grave*, SLATE (Feb. 28, 2011, 6:54 AM), <https://slate.com/human-interest/2011/02/the-greek-burial-crisis-with-land-a-valuable-resource-the-state-requires-the-recycling-of-cemetery-space.html> [<https://perma.cc/YD2S-LQDY>] (noting that roughly 8000 cadavers are needed annually for medical training).

59. Jeanne Sager, *Most Americans Are Too Fat to Donate Their Bodies to Science*, VICE (Mar. 14, 2017, 10:00 AM), https://www.vice.com/en_us/article/vvjz3d/most-americans-are-too-fat-to-donate-their-bodies-to-science [<https://perma.cc/B5YK-DMPS>].

60. *Id.* With a body mass index over thirty, one may be characterized as “obese.” *Id.* A BMI over forty is considered a signal of morbid obesity. *See id.* Professor Steven Heymsfield of Louisiana State University does not mince words explaining the obesity cap rationale, stating, “When you’re doing medical dissection, and you’re up to your elbows in fat, it’s greasy and unpleasant.” *Id.*

pounds).⁶¹ Further, although it is illegal to sell the remains of your deceased loved one in the United States, a commercial market exists for the purchase and sale of cadavers and dismembered parts.⁶² The loved ones of a decedent stand to make no profit on remains that are commoditized to generate a substantial return for others.⁶³ Body brokers generally receive cadavers for free (or close to free)⁶⁴ from survivors who often believe the remains will be used for research or education—and brokers stand to make as much as \$5800 selling the whole cadaver (or possibly more for a disaggregated cadaver).⁶⁵ Finally, there is little oversight over medical donation as a whole, and little guarantee that donated remains will be used for the intended purpose.⁶⁶ By way of example, bodies donated to Tulane University in 2004 were shipped to a broker who then passed them to the Army for landmine experiments.⁶⁷

Few good options remain for those who are economically constrained and are unable to afford funeral, burial, or cremation expenses. The Funeral Consumers Alliance does not provide any funding to consumers, but will assist the consumer with finding low-cost options.⁶⁸ If the death of the decedent is attributable to a national disaster, the Federal Emergency Management Agency (“FEMA”) may be authorized to provide burial assistance.⁶⁹ The

61. *Id.* (“Most medical school tables are not large enough to accommodate a human being larger than 200 lbs. or longer than 6’ tall. Donated bodies also have to be moved by students and/or researchers, and heavier bodies are harder to move, posing injury risk.”).

62. *See, e.g.,* Corinne Purtill, *The Awful Truth of Donating a Body to “Science,”* QUARTZ (Oct. 25, 2017), <https://qz.com/1111853/the-unregulated-reality-of-donating-a-body-to-science/> [<https://perma.cc/93TH-748L>].

63. *See, e.g.,* John Shiffman & Reade Levinson, *Made in America: U.S. Body Brokers Supply World with Human Torsos, Limbs and Heads,* REUTERS: THE BODY TRADE (Feb. 8, 2018, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-bodies-export/> [<https://perma.cc/D6JW-Q5LZ>].

64. *See id.* (“‘I had no money,’ said Tina Johnson . . . [and] ‘[i]t was a free cremation.’ Mary Hughes, whose 52-year-old son, Grady Hughes Jr, died of cancer in late 2012, recalled that ‘somebody from hospice gave us a pamphlet. It was a good idea. . . . The cremation was free, and it was donating the body for medical purposes.’”).

65. *Id.*

66. Purtill, *supra* note 62 (noting that the public does not “understand how sketchily this industry is governed”).

67. Shiffman & Levinson, *supra* note 63.

68. *See generally* *Losing a Loved One Is Hard. Planning a Funeral Shouldn’t Be.*, FUNERAL CONSUMERS ALLIANCE, <https://funerals.org/> [<https://perma.cc/PL2Q-SRKT>].

69. *Funeral Assistance Fact Sheet*, FEMA, https://www.fema.gov/media-library-data/1565189678667-0fdafea4dbca363ed6380cf2ae453aa8/FACTSHEET_FuneralAssistanceFIN_A2019Compliant.pdf [<https://perma.cc/4Z7A-JCQA>]; *see* Lisa Song & Yeganah Torbati, *Grieving Families Need Help Paying for COVID-19 Burials, but Trump Hasn’t Released the Money*, PROPUBLICA (Apr. 29, 2020, 2:51 PM), <http://www.propublica.org/article/fema-bur>

Social Security Administration offers a one-time death settlement amount of \$255 to the spouse or children of the decedent.⁷⁰ If the decedent was of retirement age, his surviving spouse or children may also be eligible for survivor's benefits.⁷¹ Benefits may also be available through the United States Department of Veterans' Affairs if the deceased served in the military.⁷² Also, a number of charities exist to help those in financial need. Surviving loved ones should consider charities related to the deceased's military history, union membership, professional membership, club membership, religious affiliation, and/or hobbies.

States or municipalities may have programs available to assist with burial and funeral expenses for victims of homicide.⁷³ In some jurisdictions, it is relatively easy for survivors to receive compensation or assistance. In others, reimbursement may take a substantial amount of time and require that survivors advance costs and wait for reimbursement.⁷⁴ Conditions for these programs may

ial-relief-coronavirus [https://perma.cc/M3WK-HEPB] ("FEMA has helped pay for the burials of victims of past disasters. But months into the coronavirus pandemic, the Trump administration has sat on similar requests. Families of COVID-19 victims have been forced to turn to religious centers and GoFundMe.").

70. *Does Medicaid Pay for Cremation?*, MEDICARE, https://www.medicare.org/articles/does-medicaid-pay-for-cremation/ [https://perma.cc/J6G5-UE3J].

71. *Planning for Your Survivors*, SOC. SECURITY ADMIN., http://www.ssa.gov/benefits/survivors/onyourown.html [https://perma.cc/9N3W-EDH8].

72. *Compensation: Burial Benefits*, U.S. DEPT VETERANS AFF., https://www.benefits.va.gov/compensation/claims-special-burial.asp [https://perma.cc/9YVB-EMRP].

73. *See Transforming Society's Response to Homicide*, LOUIS D. BROWN PEACE INST., http://www.ldbpeaceinstitute.org/news/louis-d-brown-peace-institute-announces-burial-assistance-fund-survivors-violent-crimes [https://perma.cc/5JN9-3S9N]. Low-income families can reach out to Maryland's Criminal Injuries Compensation Board ("CICB") for help covering up to \$5000 in burial costs. Karen Houppert, *From Gunshot to Grave: The High Cost of Murder in Baltimore*, BALT. SUN (Jan. 12, 2016), https://www.baltimoresun.com/citypaper/bcpnews-from-gunshot-to-grave-the-high-cost-of-murder-in-baltimore-20160112-story.html [https://perma.cc/47XY-4SGS]. It can take up to six months for these claims to be approved. *Id.* In Chicago, up to \$7500 in funeral expenses will be paid to the families of homicide victims—which has created concerns that some funeral homes are engaging in predatory practices to ensure all \$7500 is spent. *Chicago's 'Predatory' Funeral Homes Making a Killing in US Murder Capital*, RT (Aug. 27, 2018, 9:47 AM), https://www.rt.com/business/436920-funeral-homes-homicide-victims/ [https://perma.cc/E7T3-BRTA].

74. *See 4 Ways to Get Help Paying for Funeral Expenses*, SCI. CARE (Dec. 1, 2015), https://www.sciencecare.com/blog/4-ways-to-get-help-paying-for-funeral-expenses [https://perma.cc/DQ6F-9L79] (noting difficulties associated with indigent burial programs at a county or state level, stating, "These services are becoming increasingly difficult and time consuming to qualify for as local government budgets are tight"); *see also* Liz Farmer & Mattie Quinn, *Rising Funeral Costs Put Pressure on Local Governments*, GOVERNING.COM (June 6, 2019, 11:54 AM), https://www.governing.com/topics/finance/gov-funeral-assistance-cost.html [https://perma.cc/7B43-RHLC] (quoting one judge grappling with his county's limited budget: "I'm out of money for indigent burials this year, and I've got six months left to go.").

limit eligibility.⁷⁵ States or municipalities may also offer programs to assist with some or all of the burial or funeral expenses for those decedents who are on a public assistance program at the time of their death.⁷⁶

Another enduring myth is that Medicaid pays funeral, burial, or cremation expenses.⁷⁷ When an applicant's income or assets exceed the qualification cap, the applicant may need to spend down income or assets to be eligible for Medicaid.⁷⁸ Provided that conditions are met, funds set aside and earmarked to cover funeral, burial, or cremation costs may be excluded from asset accountings for purposes of determining eligibility.⁷⁹ Though Medicaid itself does not cover funerary expenses, resources may exist at the state or county level to provide funeral assistance for those enrolled in Medicaid.⁸⁰

The loved ones of the decedent should always investigate whether internment rights in a particular graveyard were purchased prior to death (and generally paid for in full at the time of purchase),⁸¹ and also whether any pre-need (as compared to at-need) prepayment planning was done to cover funeral, burial, or crematory expenses.⁸² There is no reliable data on the number of

75. For example, in Ohio, survivors are ineligible if the victim was convicted of a drug-related or violent crime in the decade preceding the homicide. *Ohio Victims of Crime Compensation Program*, OHIO ATT'Y GEN., <https://www.ohioattorneygeneral.gov/Files/Individuals-and-Families/Victims/Crime-Victim-Comp-Form.aspx> [https://perma.cc/PV5L-C2EH]. Ohio's Victims of Crime Compensation Program avails Ohio citizens of state funding to cover expenses resulting from crime-related injury or death. *Id.* The application for said assistance specifically states in its eligibility checklist that "[a]nyone who engaged in a felony of violence or drug trafficking within 10 years prior to the crime that caused the injury [or death]" is not eligible for state assistance. *Id.*

76. For example, in Illinois, such a benefit exists but the maximum amount that may be paid is \$1103 for a funeral or \$552 for a cremation. *Funeral & Burial Benefits*, ILL. DEP'T HUM. SERVS., <https://www.dhs.state.il.us/page.aspx?item=30367> [https://perma.cc/74KZ-MF9R]. In Washington, D.C., "funeral aid maxes out at \$800 for a burial and caps the family's total expenses at \$2,000." Farmer & Quinn, *supra* note 74. In New York City, as long as the funeral, in its entirety, costs no more than \$1700, the state may avail survivors up to \$900 in funeral assistance; cremation costs are exempt from this cap. *Id.* By comparison, Arizona "limit[s] subsidies to \$485 and require[s] families of the deceased to prove they're financially in need." *Id.*

77. *Does Medicaid Pay for Cremation?*, *supra* note 70.

78. *Id.*

79. *Id.*

80. Kate Wight, *Medicaid Funeral Assistance: Benefits & How to Access Them*, CAKE (Oct. 10, 2019), <https://www.joincake.com/blog/medicaid-funeral-assistance-benefits/> [https://perma.cc/5T2X-J23E].

81. *See* MARSH, *supra* note 56, at 75.

82. *See id.*

consumers who engage in pre-need prepayment planning, and prepayment options are not governed by the Funeral Rule.⁸³ It has been estimated that roughly 70% of decedents have done no lifetime estate or burial planning, but for those who have done lifetime funeral planning, roughly 50% to 85% prepay, and the American Association for Retired Persons approximates that there are \$40 billion in pre-need funeral contracts in existence.⁸⁴ It is worth investigating if your deceased loved one may have done pre-need planning and prepayment, because a failure to do so may mean paying for expensive goods and services that have already been purchased.

When all potential resources have been exhausted that may be of assistance to the financially responsible party, the last remaining options are to beg, borrow, or surrender the decedent. There is cause to be concerned that survivors are now trusting that friends and family will scrape together money to cover funerary expenses, in much the same way that one raises money for a noble charitable cause through a carwash or bake sale.⁸⁵ Crowdfunding is considered a dignified way in which to approach family and friends to ask for financial assistance in times of grief, and platforms for raising money for funeral assistance abound: GoFundMe,⁸⁶ YouCaring, MyCause, Pozible, FuneralFund,⁸⁷ GracefulGoodbye, Indiegogo, and FuneralFundMe.⁸⁸ Crowdfunding seems to have become a norm for families dealing with unexpected deaths to crowdfund funeral, burial, and cremation expenses.⁸⁹ In fact, the Chief Execu-

83. See *Pre-Paid Funeral Plans: Buyer Beware*, ELDER L. ANSWERS (Dec. 24, 2018), <https://www.elderlawanswers.com/pre-paid-funeral-plans-buyer-beware-1098> [<https://perma.cc/F6U5-DGDZ>].

84. See MARSH, *supra* note 56, at 75.

85. See Laura M. Holson, *As Funeral Crowdfunding Grows, So Do the Risks*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/business/funerals-crowdsourcing-crowdfunding-scams.html> [<https://perma.cc/RVH5-RAA9>].

86. *Id.* (“GoFundMe, one of the largest fund-raising sites, says that 13 percent of its campaigns created in 2017 were described as memorials, which include funerals and are one of the company’s fastest growing categories. That follows on a 2015 study by the Funeral and Memorial Information Council, which reported that 17 percent of adults aged 20 to 39 had used the internet to solicit or donate money for funeral-related arrangements.”).

87. Julie Power, *Fears over GoFundMe Boom in Fundraising for Funerals*, SYDNEY MORNING HERALD (Aug. 13, 2016, 1:50 PM), <https://www.smh.com.au/national/fears-over-gofundme-boom-in-fundraising-for-funerals-20160803-gqjunv.html> [<https://perma.cc/NTR2-2U8R>].

88. Holson, *supra* note 85.

89. Song & Torbati, *supra* note 69 (“GoFundMe sites that have sprung up in the crisis

tive Officer of GoFundMe admits that his staff coaches funeral organizers⁹⁰ on ways to stage fundraising campaigns to optimize the chances the campaign will go viral.⁹¹ The rarely addressed inequity⁹² that exists with crowdfunding of funerary expenses is that campaigns are more likely to be lucrative when the subject of the campaign is young,⁹³ white, and attractive.⁹⁴

Borrowing to shoulder the financial burden of death service expense is another option. In the United States, funeral homes generally accept credit cards.⁹⁵ For the creditworthy, an unpaid balance remaining on the books of a funeral home will often accrue

show the shortfalls many families are facing. Family and friends of Devin Francis, a 44-year old radiology technician in Miami who was about to get married when he died of COVID-19 in early April, raised \$4300 of its \$5000 GoFundMe goal.”).

90. Holson, *supra* note 85; see generally Mike Pearl, *People Are Now Crowdfunding Their Funerals Online*, VICE (Sept. 19, 2013, 8:30 AM), <https://www.vice.com/sv/article/9bz5wa/people-are-now-crowdfunding-their-funerals-online> [<https://perma.cc/US9Y-4RYZ>] (“But if I were a crooked funeral director, I would see directing customers to these new fundraising opportunities as an alternative to letting them glimpse the last page in my ‘menu of services’ marked in fancy cursive ‘For the Bereaved of Humbler Means.’ Why show a customer the cheaper option if I can direct them to a source of money instead?”).

91. Holson, *supra* note 85. Funeral organizers are not the only industry participants coached to optimize viral crowdfunding campaigns: “The bereaved, too, are advised to contact reporters and refresh pages with comments to maintain interest.” *Id.*

92. See Nathaniel Popper & Taylor Lorenz, *GoFundMe Confronts Coronavirus Demand*, N.Y. TIMES (Mar. 26, 2020) (citing Sumin Lee & Vili Lehdonvirta, *New Digital Safety Net or Just More ‘Friendfunding’? Institutional Analysis of Medical Crowdfunding in the United States* (Mar. 5, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559901 [<https://perma.cc/4TV5-G7XU>]), <https://www.nytimes.com/2020/03/26/style/gofundme-coronavir-us.html> [<https://perma.cc/SWY3-QSW3>]).

Two researchers at the Oxford Internet Institute wrote a paper . . . that suggests that campaigns in wealthier areas of the United States, with better pre-existing social nets, tend to be more successful than those in poorer areas, where the need is greater to begin with. “Campaigns are least likely to reach their goals when they most need it,” said Sumin Lee, the lead author of the paper. “It could be a good opportunity, but we have to be mindful that the success in crowdfunding at a time like this is likely to be unevenly distributed.”

Id.

93. See Pearl, *supra* note 90 (“It would cost about \$10,000 to bury your dead ass right now. I’m talking to you, 18- to 35-year-olds If you die penniless, your family could and should consider going the crowdfunding route on Giveforward, Donationto, or Graceful Goodbye.”).

94. See Tamara Kneese, *Mourning the Commons: Circulating Affect in Crowdfunded Funeral Campaigns*, SOC. MEDIA + SOC’Y, Jan. 2018, at 9 (“Those who are most marginal in society are the least likely to attract sufficient compassion and are therefore likely to have failed crowdfunding campaigns.”).

95. *Payment Options*, FUNERAL HELP PROGRAM, <https://www.funeral-help.com/funeral-topics/payment-options/> [<http://perma.cc/2Z47-2VZY>] (advocating lower interest rates of credit cards compared to carrying a balance at a funeral home, and noting use of credit cards to pay for funerals “is also a good way to keep your insurance benefits out of the hands of the death industry”).

more interest than an introductory credit card offer with a low interest rate.⁹⁶ A subprime loan industry has developed to offer financing for those with bad or nonexistent credit, with one site advertising interest rates as high as 35.99%.⁹⁷

The final option available to those who are unable to bear the expense of death service is to simply surrender or abandon the deceased. Every state has a different approach to the disposition of indigent or unclaimed remains, which may be cremated or buried in a potter's field.⁹⁸ The disposition of the unclaimed dead occurs largely at the expense of the taxpayer when living relatives cannot be found, although the inability to trace next of kin has become increasingly less common in the age of the internet.⁹⁹ However, some relinquish rights over the deceased for no other reason than they are priced out of funerals or burials,¹⁰⁰ and there is no other choice than to allow local authorities to do as they wish with the remains.¹⁰¹

III. A MARKETPLACE OF INEVITABLE CONSUMPTION

For the majority of consumers, paying for funerary expenses (funeral, burial, and/or cremation) will be the third-largest expense of their lifetime, after the purchase of a house and an automobile.¹⁰² Funerary expenses are distinct from other household expenses in a myriad of ways, but notably, they are often accompanied by bereavement of the loss of a loved one. Death is regarded as one of

96. *Id.*

97. Eric Bank, *4 Bad-Credit Funeral Loans*, BADCREDIT.ORG (Jan. 3, 2020), <https://www.badcredit.org/how-to/bad-credit-funeral-loans/> [<https://perma.cc/3FJC-Y4X4>].

98. Hart Island in New York City is the largest potter's field in the county, with more than a million men, women, and children being buried there in trenches since 1869. See Nina Bernstein, *Unearthing the Secrets of New York's Mass Graves*, N.Y. TIMES (May 15, 2016), <https://www.nytimes.com/interactive/2016/05/15/nyregion/new-york-mass-graves-hart-island.html> [<https://perma.cc/HNS9-TL43>] (noting that some people argue that "the government's power to appropriate the bodies of the marginalized should be unacceptable today"). It is off-limits to the public and the burials are managed through prison labor. *Id.*

99. See Angela Kennecke, *Abandoning the Dead*, KELOLAND (Jan. 15, 2017, 9:58 PM), <https://www.keloland.com/news/abandoning-the-dead/> [<https://perma.cc/T77N-APEN>].

100. See Williams, *supra* note 23 (noting that a coroner in Illinois resigned after receiving criticism for holding remains "hostage" until living relatives could pay \$1000).

101. See Kennecke, *supra* note 99 ("Abandoning the dead isn't always about the money. Some relatives just never pick up the ashes after cremation. When Schmitz became the funeral home manager 20 years ago, there were 30 cremains sitting on the shelf unclaimed. Some had been there for decades.")

102. Kopp & Kemp, *supra* note 5, at 326.

life's most stressful events for the living, with a third of survivors suffering from detrimental mental or physical health issues following a major loss.¹⁰³ Part III of this Article will consider obstacles and challenges that exist in the market structure for death and will then explore gaps in marketplace regulation that bear upon issues of consumer choice and pricing.

A. *Structural Features, Obstacles, and Challenges*

The structure of any marketplace has the potential to influence consumption choices. The main features of the death services industry that impact consumer choices include uncertainty of need, information asymmetry, vulnerability of the consumer, and an inelastic marketplace.

When a consumer is unaware of the time period in which they must consume, they are unlikely to do so unless the need becomes obviously more pressing—which is the reason that socioeconomic, age, and infirmity¹⁰⁴ all have a bearing on both estate planning and death service prearrangement.¹⁰⁵ Because of a failure of consumers to prearrange death services, most consumption within the death services space will occur through bereaved survivors.¹⁰⁶ The living are tasked with approximating the wishes of the deceased as to disposition of remains.¹⁰⁷ Decisions must be made in relatively short order during a time of grieving.

103. Colin Murray Parkes, *Coping with Loss: Bereavement in Adult Life*, 316 *BMJ* 856, 856 (1998). One study found that death following termination of life support induced stress levels on par with survivors of construction and ferry disasters, and more than twice as high as those who have lost their personal residence to fire. *OHSU Researchers Discover Powerful Role of Advance Directives in Relieving Family Stress*, OR. HEALTH & SCI. U. (Mar. 15, 2001), <https://news.ohsu.edu/2001/03/15/ohsu-researchers-discover-powerful-role-of-advance-directives-in-relieving-family-stress> [<https://perma.cc/58LH-E9W4>].

104. The COVID-19 pandemic reminds everyone of their own mortality. Some funeral directors report that prearrangement planning and purchases have jumped significantly. Jane Wells, *Coronavirus Pandemic Forces the Funeral Industry Online*, *CNBC* (May 27, 2020, 1:30 PM), <https://www.cnn.com/2020/05/27/coronavirus-pandemic-forces-the-funeral-industry-online.html> [<https://perma.cc/AAM5-LAZA>].

105. Dwayne A. Banks, *The Economics of Death? A Descriptive Study of the Impact of Funeral and Cremation Costs on U.S. Households*, 22 *DEATH STUDS.* 269, 272 (1998) (“[W]hen surveyed over 80 percent of adult Americans reported that the appropriate time for making these arrangements is when they are afflicted with a serious illness.”).

106. Mark Evely, *When Someone Dies, What Happens to the Body?*, *CONVERSATION* (Sept. 15, 2020, 7:49 AM), <https://theconversation.com/when-someone-dies-what-happens-to-the-body-143070> [<https://perma.cc/2J7X-6PJX>].

107. STEPHEN PROTHERO, *PURIFIED BY FIRE: A HISTORY OF CREMATION IN AMERICA* 1

This is problematic: the grief-stricken consumer does not behave like the typical consumer and is forced to deal with an extraordinarily expensive expenditure at a time when he or she is likely to be cognitively impaired.¹⁰⁸ Grieving can and often does cause the bereaved to develop bodily symptoms, particularly when the “grief cannot be handled adequately by the psychological structure.”¹⁰⁹ The bereaved may often be in a constant state of discomfort or distraction, unable to concentrate, and have little energy for new activities or relationships.¹¹⁰ Grief can also result in suppressed immunity, increased blood pressure, and higher risk of blood clots.¹¹¹ Almost all studies on bereavement and mortality show that grief increases (sometimes dramatically) mortality rates.¹¹²

During this time of bereavement, the relatively uninformed consumer generally leans upon the advice of industry professionals with a profit-seeking objective¹¹³—and in doing so, the funeral director becomes the primary source of information with regard to death services options.¹¹⁴ Information asymmetry becomes an issue, and the consumer deals with the challenge of “etiquette uncertainty” in attempting to make arrangements for a loved one.¹¹⁵

(2001) (“In every human society the living care for the corpse.”).

108. See Bernal, *supra* note 6. In the U.K., the average family “falls into £1,600 debt to cover funeral costs, often taking payday loans to cover the expense.” *Id.*

109. ROBERT KASTENBAUM, *DEATH, SOCIETY, AND HUMAN EXPERIENCE* 336 (5th ed. 1995).

110. *Id.*

111. See Thomas Buckley, Dalia Sunari, Andrea Marshall, Roger Bartrop, Sharon McKinley & Geoffrey Tofler, *Physiological Correlates of Bereavement and the Impact of Bereavement Interventions*, 14 *DIALOGUES IN CLINICAL NEUROSCIENCE* 129, 130 (2012) (observing “cortisol remains elevated for at least . . . 6 months of bereavement,” linking bereavement to physical manifestations of grief as cortisol is “associated with increased cardiac risk, reduced immune function, and reduced quality of life.”).

112. KASTENBAUM, *supra* note 109, at 338.

113. See Banks, *supra* note 105, at 274–75 (noting funeral directors have no incentive to nudge consumers toward more affordable alternatives).

114. BUREAU OF CONSUMER PROT., *FUNERAL INDUSTRY PRACTICES: FINAL STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE 4* (1978) (“While the ‘traditional’ funeral may be beneficial to some, its widespread advocacy by funeral directors has served to restrict unreasonably consumers’ choices in arranging for disposition of the dead. In many instances, funeral ‘counseling’ is really thinly-disguised salesmanship designed to persuade consumers to purchase additional and costlier funeral merchandise and services.”).

115. For example, one forty-year-old father experienced etiquette uncertainty upon the burial of his infant son. Mercedes Bern-Klug, *The Decision Labyrinth: Helping Families Find Their Way Through Funeral Options*, 28 *GENERATIONS: J. AM. SOC’Y ON AGING* 31, 32 (2004). The father wanted to remain graveside until his son’s casket was buried, but the cemetery staff insisted they would bury the casket after everyone departed. *Id.* The father felt pressured to leave—and years later, he continued to wonder if his son’s casket was ever

The consumer does not understand the socially acceptable behavior or etiquette involved in making death services arrangements, and relies upon advice offered by the funeral home (which is usually the first and only one they contact). The consumer is unlikely to push-back or question the expertise tendered by the funeral director.¹¹⁶ Further, the stakes are raised for all of these decisions because of the speed with which decisions must be made and the finality of the decisions—cremation cannot be undone, caskets may never be returned, and so forth.¹¹⁷

Consider the example of Surviving Spouse. He is married to the Deceased, who died without preplanning or burial instructions. The couple has been married for decades and the passing of the Deceased is attributable to the natural wasting of age—imminent, not entirely expected, but certainly inevitable. In a 2016 survey, 81% of respondents report that they only contact one funeral home before contracting services, and it is highly likely that Surviving Spouse will contact only one funeral home.¹¹⁸ The choice of funeral home may be based upon either geographic convenience or a recommendation of a friend, neighbor, clergy member, or doctor. The moment that the funeral director picks up the body of the Deceased, an important decision with economic consequences has been made.¹¹⁹ Products and pricing will be dictated by that one funeral director.¹²⁰ Delaying the selection of a funeral director so as to do some market research and engage in price comparisons is possible, but as discussed in depth below, few funeral directors make information available online. Grief turns Surviving Spouse into a vulnerable consumer who is unlikely to be price sensitive and is susceptible to emotional manipulation.¹²¹

buried. *Id.*

116. *See id.*

117. *Id.*

118. Jones, *supra* note 26.

119. For further discussion on possible economic consequences associated with funeral arrangement decisions, see Byron D. Sher, *Funeral Prearrangement: Mitigating the Undertaker's Bargaining Advantage*, 15 STAN. L. REV. 415, 420–23 (1963).

120. The funeral industry has drawn great criticism for abusive marketing and sales tactics. Grace D. Dawson, John F. Santos & David C. Burdick, *Differences in Final Arrangements Between Burial and Cremation as the Method of Body Disposition*, 21 OMEGA: J. DEATH & DYING 129, 144 (1990). That said, strikingly little research has been done addressing the industry's influence over consumer choice. In one survey completed by death services purchasers, they perceived very little influence exerted by funeral or crematory personnel. *Id.*

121. Surviving Spouse may be manipulated by his “desire to show the ‘proper respect’

This is not to suggest that the industry is intentionally exploitative, but instead, to recognize that there are systemic economic pressures upon the death services industry due to the inelastic nature of death: the number of deaths per year is inelastic. There is a fixed number of deaths per year, and an incentive to maximize profits with each decedent handled through the business. According to the National Funeral Directors Association (“NFDA”) *2018 Cremation & Burial Report*, the average funeral home NFDA member handled 113 funerals per year.¹²² For the funeral home to be a sustainable business, all overhead for the year must be met through a limited and relatively fixed number of funerals—which creates incentives to influence the consumer when such influence is possible.

B. Gaps in Marketplace Regulation

All funeral home activity is regulated by the Federal Trade Commission (“FTC”) under the Funeral Industry Practices Rule, colloquially referred to as the “Funeral Rule.”¹²³ The FTC enacted the Funeral Rule in 1984 to curtail systematic abusive practices within the funeral industry.¹²⁴ There is no question that the Funeral Rule was necessary in offering the consumer some form of protection.¹²⁵ Consumers now have a right to request a general price list from the funeral provider, so that they may add or eliminate goods and services.¹²⁶ If state or local law requires the purchase of any specific

for the deceased” and to give him or her the grand departure that they deserve. Sher, *supra* note 119, at 424. If Deceased engaged in basic planning while living, it is possible he would have announced to Surviving Spouse: “Screw \$9000! Put me in a cardboard box and cremate me for \$1000.” Pre-planning may prompt vastly different guilt-free choices. *Id.* at 423 (pointing out that “[t]he most powerful as well as the most universal force playing on the family at the time it meets the funeral director is the sense of guilt.”).

122. Sara J. Marsden, *What Is the 2018 Cremation Rate in the US? And How Is This Affecting the Death Industry?*, U.S. FUNERALS ONLINE (July 18, 2018), <https://www.us-funerals.com/funeral-articles/2018-US-Cremation-Rate.html> [<https://perma.cc/7L8R-KVEP>].

123. Kopp & Kemp, *supra* note 5, at 326.

124. Daniel Boguslaw, *Death Industry Predators Eye the Spoils of a Pandemic*, SOAPBOX (Apr. 2, 2020), <https://newrepublic.com/article/157149/funeral-industry-ftc-deregulation-coronavirus> [<https://perma.cc/8WEQ-HCYX>] (“Before the rule, funeral homes were notorious for extorting grieving families through a host of shady practices, which included making false statements about the necessity of embalming, hiding prices in every step of the burial and cremation processes, and framing expensive caskets and urns as the most ‘modestly priced receptacles.’”).

125. *Id.*

126. *The FTC’s Funeral Rule: Helping Consumers Make Informed Decisions During Difficult Times*, FED. TRADE COMM’N (2012) [hereinafter *The FTC’s Funeral Rule*], <https://www>.

good or service, this must be clearly designated on the price list (and the law must be cited).¹²⁷ The funeral provider must tender a price list for the casket inventory, prior to showing any caskets to the consumer.¹²⁸ The funeral provider may not refuse to allow the consumer to purchase a casket elsewhere, nor may they charge an added fee to handle an outside casket.¹²⁹ When a casket is purchased from an outside vendor, the funeral provider may not require that the consumer be present when it is delivered to them.¹³⁰ A funeral provider may not tell the consumer that a casket is required by law for a direct cremation, and must make available (inexpensive) alternative containers—such as canvas, pressboard, or cardboard containers.¹³¹ No container or process will preserve remains indefinitely, and the Funeral Rule prohibits the provider from representing that any burial vault, grave liner, casket, or embalming process is able to do so.¹³² Violators of the Funeral Rule are fined and consumer protection groups have been formed.¹³³

The question is whether or not the Funeral Rule went far enough in protecting the consumer. Misrepresenting state law and pricing disclosure violations remain a problem.¹³⁴ In 2017, the FTC investigators went undercover into 134 funeral homes and found that

[ftc.gov/news-events/media-resources/truth-advertising/funeral-rule](https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule) [https://perma.cc/5TZP-UBDM].

127. *Id.*

128. *Funeral Costs and Pricing Checklist*, FED. TRADE COMM'N (2012), <https://www.consumer.ftc.gov/articles/0301-funeral-costs-and-pricing-checklist> [https://perma.cc/S6UB-WF6V] (“Industry studies show that the average casket shopper buys one of the first three models shown, generally the middle-priced of the three. So it’s in the seller’s best interest to start out by showing you higher-end models. If you haven’t seen some of the lower-priced models on the price list, ask to see them—but don’t be surprised if they’re not prominently displayed, or not on display at all.”).

129. *The FTC’s Funeral Rule*, *supra* note 126. In 2009, general counsel for the NFDA affirmed that “funeral homes may offer a discounted package funeral that is available only to families that choose to purchase a casket from the funeral home.” T. Scott Gilligan, *FTC Staff Opinion on Discounted Packages*, NAT’L FUNERAL DIRECTORS ASS’N (Feb. 26, 2009), <https://www.nfda.org/resources/compliance-legal/ftc-funeral-rule/ftc-advisories-and-opinions/ftc-staff-opinion-on-discounted-packages> [https://perma.cc/J2QV-B2C2]. Gilligan cautioned, however, that discounts for in-house casket purchases cannot lower the price of the funeral home’s basic service fee. *See id.*

130. Erica Lamberg, *Buying a Casket or Urn on Your Own for a Funeral*, USA TODAY (Mar. 24, 2020), <https://www.usatoday.com/story/community-hub/funeral-planning/2020/03/24/buying-casket-urn-your-own-funeral/2872500001/> [https://perma.cc/3QN4-SDJT].

131. *Funeral Costs and Pricing Checklist*, *supra* note 128.

132. *Id.*

133. Boguslaw, *supra* note 124.

134. Ismat Sarah Mangla & Lisa Gibbs, *When Putting a Loved One to Rest, Avoid These Misleading Sales Tactics*, MONEY (Nov. 9, 2012), <https://money.com/avoid-misleading-funeral-costs/>

twenty-nine (21.6%) failed to disclose pricing information in compliance with the Funeral Rule.¹³⁵ Because of constrained resources, the FTC has only an estimated twelve secret shoppers to investigate compliance with the Funeral Rule.¹³⁶

The FTC files very few lawsuits against violators: only six actions were filed from 2000 to 2012.¹³⁷ This is due in large part to the Federal Rule Offenders Program (“FROP”), developed in partnership with the NFDA in January 1996 as an alternative to litigation.¹³⁸ Under FROP, a death services provider violating the Funeral Rule may avoid being publicly identified in a lawsuit for up to \$43,280 in civil penalties per violation¹³⁹ by making a voluntary payment to the United States Treasury (or appropriate state fund) for an amount that is likely less than the amount that would be sought through litigation,¹⁴⁰ and participating in a compliance

eral-and-cemetery-sales-tactics/ [https://perma.cc/XW22-A5LW] (noting, for example, that while embalming is seldom required, due to embalming’s notable profit margins, “a funeral director might just *forget* to enlighten you about the facts.” (emphasis added)).

135. *FTC Undercover Inspections of Funeral Homes in 11 States Test Prompt Compliance with Funeral Rule Disclosure Requirements*, FED. TRADE COMM’N (Apr. 18, 2018) [hereinafter *FTC Undercover Inspections*], <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-undercover-inspections-funeral-homes-11-states-test-prompt> [https://perma.cc/Q9LA-KCCS].

136. Tracy Samilton, *Why the Funeral Rule Is One of the Least-Known Consumer Protection Laws in the Country*, MICH. RADIO (Oct. 22, 2018), <https://www.michiganradio.org/post/why-funeral-rule-one-least-known-consumer-protection-laws-country> [https://perma.cc/MQN4-FGRG] (reciting the FTC’s responses, and lack thereof, to the author’s FOIA request); see *One in Four Funeral Homes Breaking the Law—FTC*, FUNERAL CONSUMERS ALLIANCE (Mar. 30, 2009), <https://funerals.org/2009ftcsweeps/> [https://perma.cc/PHA5-DKQN] (offsetting the FTC’s boastful reports of consumer-protection efforts, suggesting “despite the FTC’s headline claiming the sweeps ensure consumers are protected[,] funeral homes know the FTC has little staff to enforce the 25-year-old Rule.”).

137. Mangla & Gibbs, *supra* note 134.

138. *FTC Announces Results of the First Year of the Funeral Rule Offenders Program*, FED. TRADE COMM’N (Jan. 22, 1997), <https://www.ftc.gov/news-events/press-releases/1997/01/ftc-announces-results-first-year-funeral-rule-offenders-program> [https://perma.cc/7CES-7P6W].

139. *See Complying with the Funeral Rule*, FED. TRADE COMM’N (Aug. 2012), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-funeral-rule> [https://perma.cc/9U4V-HSDJ]; *FTC Undercover Inspections*, *supra* note 135 (“The three year [FROP] . . . is an alternative to an FTC lawsuit that could lead to a federal court order and civil penalties of up to \$16,000 per violation.”); see also Justin Crowe, *FTC Releases Results of Undercover Funeral Rule Investigation . . . 4 Regions Bombed*, CONNECTING DIRECTORS (June 18, 2018), <https://connectingdirectors.com/52111-funeralrule-investigation> [https://perma.cc/P3H9-NVPJ] (pointing out another FROP benefit—when funeral directors opt for FROP, they are not required to reduce staff).

140. The voluntary payment to the United States Treasury is 0.8% of the funeral home’s average annual revenue for the last three years. *Federal Trade Commission ‘Funeral Law’ Conducts Undercover Investigations*, U.S. FUNERALS ONLINE, <https://www.us-funerals.com/funeral-articles/funeral-law-undercover.html> [https://perma.cc/JU69-RMQW]. The FTC will

training program run by the NFDA.¹⁴¹ A problem with FROP is that the privacy of the offending funeral providers is protected: funeral providers are essentially authorized to pay hush money to the federal government to avoid public disclosure and prosecution.¹⁴²

During the last review of the FTC's Funeral Rule in 2008, no changes were made.¹⁴³ The Funeral Rule is up for a ten-year review in the midst of a pandemic in May 2020, with its fate in the hands of five FTC commissioners appointed by Donald Trump in 2018—a panel that consists of three Republican and two Democratic appointees.¹⁴⁴ Democratic Commissioner Chopra, former assistant director of the Consumer Finance Protection Bureau, drafted a memorandum suggesting that the appropriateness of FROP needs to be examined, both because of the involvement of the NFDA (described as “an industry lobbying group”) and also because the FTC “withholds the names of these lawbreaking funeral homes from the public when announcing the results of funeral home inspections, a privilege that no other industry under FTC jurisdiction enjoys.”¹⁴⁵

In addition to evaluating the appropriateness of FROP, the issue of price disclosure needs to be revisited. The Funeral Rule was issued at a time when computers were not accessible in the palm of one's hand and the internet had not yet been conceived. In today's

bring an action against an offender who fails to provide tax returns to substantiate the amount of the payment. *See id.*

141. The NFDA collects a fee from violators to compensate it for management of the program. *FTC Funeral Rule Review: What to Expect*, AZFCCA (Jan. 23, 2020), <https://azfccca.org/ftc-funeral-rule-review-what-to-expect/> [<https://perma.cc/SS2Z-W2HQ>]. As the entity in charge of running the FROP program, NFDA “reviews compliance requirements as well as additional education and training.” *Id.*; *see also* Crowe, *supra* note 139 (suggesting Funeral Rule violations are “a win for NFDA” as each violator is another “paying member[] who they can teach to be better behaving funeral professionals”).

142. In at least one instance, the privacy of the Funeral Rule violators has been protected even against Freedom of Information Act requests. Sheryl Harris, *FTC Fails Public by Burying Funeral Home Violations: Plain Dealing*, CLEVELAND.COM (Jan. 12, 2019), https://www.cleveland.com/consumeraffairs/2012/07/ftc_fails_public_by_burying_fu.html [<https://perma.cc/V88C-P99M>] (commenting on the FTC's refusal to provide details regarding funeral homes found to have committed “supposedly lesser” Funeral Rule violations).

143. Ann Carrns, *With Funeral Home Rules Due for an Update, There's a Push for Online Prices*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/your-money/funeral-homes-pricing.html> [<https://perma.cc/8TY5-K324>] (“The last review of the funeral rule ended in 2008, when . . . the commission declined to adopt any changes.”).

144. Two of the five appointees must be from the political party opposite that of the sitting President. Boguslaw, *supra* note 124.

145. *Id.*

technology-savvy world, more than 80% of Americans use the internet to comparison shop pricing and services.¹⁴⁶ And while public sentiment is that pricing for death care services should be available online, the Funeral Rule has no such requirement. A survey conducted by the consumer protection group Funeral Consumers Alliance demonstrated that 73% of United States funeral homes with websites had absolutely no pricing information available online.¹⁴⁷ California is the only state that requires that funeral homes list prices online, but this requirement contains an exception that effectively swallows the rule:¹⁴⁸ an exception¹⁴⁹ pushed for by the California Funeral Directors Association that permits funeral homes to simply state “price by request” instead of listing actual prices.¹⁵⁰

IV. CONSIDERING FUNERAL POVERTY

Viewed through a materialistic lens, poverty is the financial inability to meet basic needs.¹⁵¹ Taken more broadly, poverty is a

146. Joshua Slocum & Stephen Brobeck, *A Needle in a Haystack—Finding Funeral Prices Online in 26 State Capitals*, FUNERAL CONSUMERS ALLIANCE (Jan. 29, 2018), https://consumerfed.org/wp-content/uploads/2018/01/needle-in-a-haystack-finding-funeral-prices-online-report.pdf?mod=article_inline [https://perma.cc/M4XW-6RTT].

147. *Id.*

148. Joshua L. Slocum, *The Funeral Rule: Where It Came From, Why It Matters, and How to Bring It to the 21st Century*, 8 WAKE FOREST J.L. & POL'Y 89, 107–08 (2018).

Senate Bill 658 (proposed in 2011; amended, passed, and enacted January 1, 2013) requires funeral homes to either: (a) post their complete General Price List on their website with a prominent and intuitive link; or (b) in the absence of posting the complete price list, list the sixteen categories of goods and services required by the FTC Funeral Rule to be listed on funeral home price lists, along with a notice to consumers that a complete price list is available on request.

Id.

149. Teri Sforza, *Funeral Homes with Online Price Lists Charge 30% Less, Analysis Says*, ORANGE COUNTY REG. (Feb. 14, 2020, 3:01 PM), <https://www.ocregister.com/2020/02/14/funeral-homes-with-online-price-lists-charge-30-less-analysis-says/> [https://perma.cc/A3HV-PB3B] (“Online pricing characterizes funeral service as a commodity, which is incorrect. It ignores the fact that different providers offer an array of service levels, from facility features, products, and amenities, much like the example of brands in a hotel portfolio—from Courtyard Hotels to The Ritz-Carlton.”).

150. Michael Waters, *The Death Industry Is Getting Away with Murder*, WASH. MONTHLY (July 23, 2019), <https://washingtonmonthly.com/2019/07/23/the-death-industrys-biggest-threat/> [https://perma.cc/BWN5-3KG6].

151. Brian Fikkert, *The Crisis of Global Poverty*, SHARED JUST. (Aug. 24, 2016), <http://www.sharedjustice.org/international-justice/2016/8/24/the-crisis-of-global-poverty> [https://perma.cc/6CV9-H7SB]. (“For a poor person everything is terrible—illness, humiliation, shame. We are cripples; we are afraid of everything; we depend on everyone. No one needs us. We are like garbage that everyone wants to get rid of.”).

failure to meet responsibilities that results in a profound loss of individual dignity and feelings of shame and inferiority.¹⁵² Death is a time when grief may be compounded by an inability to bear the expenses associated with death service expenses—expenses that are often unplanned, unconsidered, and unavoidable. Selecting the less expensive option may not be the easiest path for those survivors for whom the process of memorializing and honoring the dead reflects societal and cultural beliefs and values.¹⁵³ Funerary practices and rituals may be sacred and implicitly meaningful to the living, and a less expensive departure tradition can be perceived as disrespecting the deceased (or the memory of the deceased). Millions of low- and middle-income families struggle with oft-discussed issues of food, housing, or healthcare insecurity, and Part IV considers the way in which the undiscussed expense of death care services may also bear upon these families.

Consider the following example: Family X consists of five people—two minor children, a father, a mother, and a grandmother. Family X's poverty threshold in 2018 is \$30,718. In 2018, the family has three earners—Mother \$12,000, Father \$8000, Grandmother \$8000—with a cumulative annual family income of \$28,000. Upon the death of Grandmother, this family will lose \$8000 in income annually. The family must also contend with the challenge of paying for the disposition of Grandmother's remains with a household income that falls below applicable poverty guidelines at the time of Grandmother's death. The median prices for the most common death services options are set forth in Table 1 below.¹⁵⁴

152. *Id.*

153. Kelli Swazey, *Life That Doesn't End with Death*, TEDMED (Apr. 2013), https://www.ted.com/talks/kelli_swazey_life_that_doesn_t_end_with_death [https://perma.cc/5V8Y-C92H].

154. This table sets forth median costs in 2019 provided by the NFDA. *Costs*, NAT'L FUNERAL DIRECTORS ASS'N (July 18, 2019), <https://www.nfda.org/news/statistics> [https://perma.cc/PA3D-VMJG].

TABLE 1

	Includes	Does Not Include	Median Cost
Adult Funeral with Viewing and Burial	Viewing, Burial, Burial Vault	Cemetery Costs such as plot, monuments or markers	\$9,135
Adult Funeral with Viewing and Burial	Viewing, Burial	Cemetery Costs such as plot, monuments or markers	\$7,640
Adult Cremation with Viewing	Rental Casket, Alternative Cremation Container	Cremation Casket or Cemetery Costs	\$6,295

Assuming that Family X has had the benefit of Grandmother's income in the year in which she passes away, the cost of a funeral with viewing and burial for Grandmother will exceed 32% of the family's gross income with a burial vault and 27.2% without. These figures do not include additional and necessary cemetery fees¹⁵⁵ for a traditional burial, and also assume that Grandmother is not a veteran.¹⁵⁶ Additional fees associated with traditional burial will add hundreds or thousands of dollars to the bill: fees for a grave

155. *Guide to Cemetery Purchases*, FUNERAL CONSUMERS ALLIANCE., <https://funerals.org/?consumers=consumers-guide-cemetery-purchases/> [<https://perma.cc/UQZ8-J28N>].

156. *Id.* ("Burials are free for vets and their spouses in national veterans[] cemeteries and free or nearly free in many state-run ones. Beware of unscrupulous sales people who target veterans—they may offer a free grave to the vet but charge an inflated rate for the spouse, or an exorbitant fee for opening and closing the grave.").

marker or a monument (ranging from \$300 to \$3000),¹⁵⁷ interment fees¹⁵⁸ (averaging \$350 to \$3000), possibly a burial permit (depending on local law),¹⁵⁹ the burial plot (averaging from \$200 to \$2000 in a public cemetery and \$2000 to \$5000 in a private cemetery)¹⁶⁰ or mausoleum,¹⁶¹ and the one-time or annual charge to maintain or care for the space.¹⁶² With these added cemetery costs, the average American funeral with burial is estimated as exceeding \$9000.¹⁶³

Death care service expenses are generally the third-largest expenditure in one's lifetime, ranking behind homes and cars.¹⁶⁴ The impact of this kind of spending can be staggering. Table 2 provides 2018 household income in the United States broken into quintiles (showing the highest dollar amount in each quintile along with the lowest dollar amount earned by the top 5% of households) by race.¹⁶⁵

157. *The Average Cost of a Burial Plot (and Other Facts You Need to Know)*, LOVE LIVES ON, <https://www.loveliveson.com/the-average-cost-of-a-burial-plot-other-facts-you-need-to-know/> [<https://perma.cc/3C5M-SGNF>].

158. *Id.* ("These are the fees that cemeteries charge to open and close the grave, to replace the sod, and to complete paperwork required for legal records. The average cost of interment fees in a public cemetery is \$350 to \$1,000, but in a private cemetery, \$600 to \$3,000. If you are considering purchasing family plots, interment fees become a very important consideration. In some cemeteries, these fees can exceed the cost of the family plots themselves.")

159. *Id.*

160. *Id.*

161. Belinda McLeod, *Mausoleum Burial Basics: Pros, Cons & Cost*, CAKE (Oct. 9, 2019), <https://www.joincake.com/blog/mausoleum-burial-basics-pros-cons-cost/> [<https://perma.cc/32Z3-JAH4>] (noting that private mausoleums start around \$25,000 for a private outdoor mausoleum, and average \$4000 for a public mausoleum).

162. *See Guide to Cemetery Purchases*, *supra* note 155.

163. RESOR, *supra* note 2, at 106.

164. *Id.*

165. This data has been gathered from the United States Census Bureau. *See Historical Income Tables: Households*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html> [<https://perma.cc/9V64-9NW7>].

2021]

FUNERAL POVERTY

415

TABLE 2

	Lowest	Second	Third	Fourth	Fifth	Lower Limit of Top 5%
All	\$25,600	\$50,000	\$79,542	\$130,000	\$130,001+	Over \$248,278
White	\$28,211	\$52,444	\$83,125	\$133,722	\$133,723+	Over \$255,299
Black	\$15,600	\$31,800	\$53,000	\$89,528	\$89,529+	Over \$172,110
Hispanic	\$22,480	\$40,034	\$63,260	\$100,022	\$100,023+	Over \$185,419

Poverty guidelines in the United States are issued annually in the Federal Register by the Department of Health and Human Services, which publishes a fixed dollar value (varying by family size and composition) as the threshold for poverty determinations.¹⁶⁶ In the United States, the official poverty rate in 2018 was 11.8%, or 38.1 million people.¹⁶⁷ Those aged 65 and older suffered from a poverty rate of 9.7%.¹⁶⁸ Poverty rates in the United States trend significantly higher for women and persons of color. In 2018, the poverty rate for females and males was 12.9% and 10.6%, respectively.¹⁶⁹ The poverty rate for primary families with an unmarried female head of household was 24.9% (or 3.7 million families)—as compared to an overall poverty rate for primary families of 9%.¹⁷⁰ The poverty rates by race are as follows: White (non-Hispanic) 8.1%, Black 20.8%, Hispanic 17.6%.¹⁷¹ To the extent that

166. See JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER & ABINASH MOHANTY, INCOME AND POVERTY IN THE UNITED STATES: 2018, at 49 (2020), <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf> [<https://perma.cc/8HG5-KLBU>].

167. *Id.* at 12.

168. *Id.* at 15.

169. *Id.*

170. *Id.* at 17.

171. *Id.* at 13.

death service expenses disproportionately weigh upon those in poverty, the expenses subtly and indirectly discriminate (in a way that is sometimes referred to as second-order discrimination) against persons of color and women.¹⁷² And while this Article does not suggest that there is an intent to discriminate, it is nonetheless important to highlight the persistently harmful way in which death care service expenses weigh upon historically marginalized people.

When a loved one dies, there is a symbolic and a practical response—both of which have associated expense.¹⁷³ Death care in the United States is an area of conspicuous consumption on which lower-income families spend far more than high-income families, relative to total expenditures, in every year studied since 1996.¹⁷⁴ In 2014, the top 1% spent significantly less in absolute dollars than everyone else, the middle class fell in line with national averages, and the poor spent a “26% greater share of total expenditures than the national average.”¹⁷⁵ In fact, the richer and/or more educated that one is, the more likely they are to be cremated versus buried, and cremation involves considerably less expense.¹⁷⁶

The reason for this distortion in spending by lower-income families is unclear. Historically, Edwardian and Victorian English funerals were an important display of status for the poor, who existed in a society with few, precious avenues to do so.¹⁷⁷ Another theory is that there have historically been higher levels of social capital in poorer communities,¹⁷⁸ and consequently, more money is spent on

172. See Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 948 (2008) (“I hoped that by pointing out that we were all infected with racism I would at least remove the very stigma that caused my friends to deny their racism, and at the same time help them recognize that the injury of racism was found in symptomatic material conditions, including inequalities of wealth, employment, schooling, health, incarceration, etc., and in the ideology that produced and justified those symptomatic material conditions.”).

173. KASTENBAUM, *supra* note 43, at 262.

174. RESOR, *supra* note 2, at 106; see also ELIZABETH CURRID-HALKETT, *THE SUM OF SMALL THINGS: A THEORY OF THE ASPIRATIONAL CLASS* 33 (2017).

175. CURRID-HALKETT, *supra* note 174, at 33.

176. *Id.* at 34.

177. *Id.* at 33–34.

178. Surviving relatives may conflate unnecessary spending on funerals, burials, or cremations as necessary to honor the deceased. See, e.g., Annie Nova, *As the Cost of Dying Rises, More Families Try Crowdfunding for Funerals*, CNBC (Dec. 7, 2019), <https://www.cnn.com/2019/12/07/more-families-are-turning-to-crowdfunding-to-pay-for-funeral-costs.html> [<https://perma.cc/5WJA-FXJA>] (“Tina Midaugh, Bowen’s older sister, was determined to give him a meaningful memorial service. ‘I couldn’t imagine people walking in and not knowing people loved him,’ [she] said.”).

death services for performative reasons, as a way of demonstrating respect for the deceased to the community at large.¹⁷⁹ Regardless of the underlying theory, it is clear that for a working-class family in the third income quintile of Table 2, spending the national average of almost \$9,000 for a funeral and burial service is financially crippling. This type of expense amounts to 10.82% of the before-tax annual income of the highest earner in the third quintile for White families, 16.98% for Black families, and 14.22% for Hispanic families.

V. TOWARDS SOLUTIONS

The FTC produced a 526-page report in 1978 titled *Funeral Industry Practices*, highlighting the problematic nature of a significant financial transaction being intertwined with grieving.¹⁸⁰ The “extreme vulnerability of funeral purchasers” is the result of “widespread ignorance of relevant information and . . . the disabling effects of grief and bereavement.”¹⁸¹ Although this report is more than forty years old, the problematic nature of the underlying transaction has not changed: the consumer must make important, expensive decisions while grieving, usually operating within severe time constraints and forced to move quickly, in a marketplace in which few consumers have any expertise.¹⁸² Ignoring death until the moment one shuffles off the mortal coil is messy, expensive, and shifts the consequences of an extraordinarily burdensome expense onto grieving loved ones. The purpose of Part V is to take on the design of consumer-protective and norm-shifting changes that may be implemented to meaningfully address funeral poverty in the United States.

Addressing the issue of funeral poverty requires more than a simple focus on increased funding, and instead requires proposed changes that will be most effective because they are targeted at important intersections where social norms have the most influence over consumer behavior. Set forth below, this Article offers a

179. CURRID-HALKETT, *supra* note 174, at 34.

180. BUREAU OF CONSUMER PROT., *supra* note 114, at 1.

181. Slocum, *supra* note 148 (quoting BUREAU OF CONSUMER PROT., *supra* note 114, at 1).

182. See Slocum & Brobeck, *supra* note 146 (“[F]or a very high percentage of funeral home services, it is [the consumer’s] first purchase, so they have no relevant buying experience.”).

framework of short- and long-term interventions aimed at disrupting entrenched custom, with an eye towards driving (directly or indirectly) affordability and accessibility for the lower- and middle-income consumer.

A. *Consumer Protection Through Increased Transparency*

A fundamental way in which to ameliorate the issue of funeral poverty is through consumer-protective measures that create transparency. Transparency is the hallmark of a properly functioning marketplace, increasing efficient allocation of resources and decreasing the risk of unsustainable or corrupt business practices.¹⁸³ In the context of death services, the economics of transparency inure to the benefit of the consumer over the vendor—meaning that changes to regulation or law that facilitate transparency may be easier said than done because pushback from death service providers is likely.¹⁸⁴ There are several important areas in which transparency must improve to protect the consumer, including closing the gaps in the Funeral Rule discussed in section III.B and other transparency measures that include possible disclosure of beneficial ownership of service providers.

For some time, consumer advocates have called upon federal regulators to close gaps in the Funeral Rule.¹⁸⁵ As discussed above, the current FTC practice of refusing to disclose the names of law-breaking funeral homes to the public is a privilege that no other industry under FTC jurisdiction is afforded.¹⁸⁶ Further, the Fu-

183. Alex Konanykhin, *How Transparency Can Help the Global Economy Grow*, WORLD ECON. F. (Oct. 10, 2018), <https://www.weforum.org/agenda/2018/10/how-transparency-can-help-grow-the-global-economy/> [<https://perma.cc/JYV7-3TU6>].

184. There is precedent for this kind of pushback. See ALAN R. KEMP, *DEATH, DYING, AND BEREAVEMENT IN A CHANGING WORLD* 128–29 (Routledge 2d ed. 2019) (noting that pushback from the funeral industry caused a softened version of the 1984 Funeral Rule to be adopted in 1994).

185. See Concurring Statement of Commissioner Rebecca Kelly Slaughter Regarding the Request for Comment on the Funeral Rule: Commission File No. P034410 (Feb. 4, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565585/2020-2-3_funeral_rule_rks_statement.pdf [<https://perma.cc/MH9Q-KVVK>] (requesting comments that highlight gaps in protections and how best to fill them).

186. Boguslaw, *supra* note 124 (quoting Statement of Commissioner Rohit Chopra Regarding the Request for Comment on the Funeral Rule: Commission File No. P034410 (Feb. 4, 2020)).

neral Rule's failure to require online pricing disclosure is inadequate for today's technologically oriented marketplace.¹⁸⁷ Information must be made readily available for the grieving consumer, who is less likely to engage in price-conscious behavior and bound by time-constrained decision-making.¹⁸⁸ Informal studies have found that death service companies that list pricing online are as much as 30% cheaper than those who refuse to disclose online.¹⁸⁹ As discussed above, a substantial minority of death care service providers actually disclose pricing online.¹⁹⁰

Transparency through digital price disclosure is an obvious, low-cost consumer-protection mechanism that has attracted technology investment into the death service space.¹⁹¹ Two startup companies (Funeralocity and Parting.com)¹⁹² developed websites to enable consumers to shop and compare a range of death services pricing, in much the same way a consumer would book a flight, rental car, or hotel room on a price comparison website.¹⁹³ Although innovators identified a consumer need, the industry resistance to pricing transparency may prove insurmountable for these startups unless digital pricing disclosures are required by law (with no loopholes or exemptions that swallow the underlying disclosure rule).¹⁹⁴

187. Carrns, *supra* note 143; *see also* Ann Carrns, *Should Funeral Homes Be Required to Post Prices Online?*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/your-money/funeral-homes-prices-online.html> [<https://perma.cc/73V7-WAG6>].

188. Maya Lora, *The Cost of Dying Is Shrouded in Mystery. Funeralocity Puts Funeral Prices Online*, MIAMI HERALD (Aug. 12, 2019, 6:00 AM), <https://www.miamiherald.com/news/business/article231844288.html> [<https://perma.cc/TWR8-AAM6>] (quoting Joshua Slocum, Director of the Funeral Consumers Alliance, as stating, "Funeral directors have had a very, very easy ride . . . Most of their customers come in a blank canvas. They don't know what the competition is charging." Such companies . . . 'can't keep living in 1950 forever.'").

189. Sforza, *supra* note 149 ("For too long, the funeral industry has wanted price not to be a factor at all, because price-conscious consumers are much less easy to 'sell' than unaware consumers who are compromised by grief.").

190. Carrns, *supra* note 143 ("Scott Gilligan, general counsel with the funeral directors association, said about 20 percent of its members—generally those in larger, competitive markets—posted prices online, but the association has not seen major demand for it from consumers.").

191. *See id.* ("[T]he industry opposes mandatory online pricing and said the decisions should be left to individual businesses.").

192. *Id.* ("Ed Michael Reggie, founder of Funeralocity, said the site let shoppers search prices at funeral homes in 100 major markets and awarded 'excellence' status to funeral homes that met its standards and fully disclosed prices. Funeralocity, he said, earns a referral fee when users book services with funeral homes that have that status. The website uses those homes agree to offer discounts to users who choose them through Funeralocity.").

193. *See Lora, supra* note 188.

194. *See Carrns, supra* note 143 ("Mr. Slocum said posting prices online would make enforcement of the rule far easier, since regulators are able to visit just a small fraction of

Another interesting area of opacity involves the ownership of funeral homes in the United States. The largest funeral home chain in the United States is publicly traded Service Corporation International (“SCI”)¹⁹⁵ (known also by its public-facing brand name Dignity Memorial), which handled the funerals of Presidents Reagan, Bush, and Ford.¹⁹⁶ SCI booked sales of \$3.2 billion in 2019, and averaged \$10,000 in revenue on each of the 319,000 deceased that it handled (or 12% of the deaths in the United States in 2019).¹⁹⁷ SCI began acquiring mom-and-pop funeral homes in the 1960s and eventually started acquiring its largest competitors—including the second-largest death care services company in North America in 2006 (Alderwoods Group),¹⁹⁸ the fifth-largest death care services company in 2010 (Keystone North America),¹⁹⁹ 70% of the nation’s largest direct cremation company in 2011 (The Neptune Society, Inc.),²⁰⁰ the remaining 30% interest in Neptune in 2013 and 2014,²⁰¹ and the second-largest chain of funeral homes and cemeteries in North America in 2013 (Stewart Enterprises, Inc., for \$1.4 billion).²⁰² With an estimated 16% share of the death

the country’s funeral homes to check compliance.”).

195. According to SCI’s 2020 10-K annual report, as of December 2019, SCI operates 1471 funeral service locations and 482 cemeteries (including 290 combination funeral services-cemetery locations), across 44 states, the District of Columbia, Puerto Rico, and Canada. Serv. Corp. Int’l, Annual Report (Form 10-K) (Dec. 31, 2019).

196. Christopher Helman, *How the Pandemic Is Killing the Death Business*, FORBES (2020), <https://www.forbes.com/sites/christopherhelman/2020/04/21/how-the-pandemic-is-killing-the-death-business> [<https://perma.cc/D7GG-XCKJ>].

197. *Id.*

198. Serv. Corp. Int’l, Annual Report (Form 10-K) (Dec. 31, 2019).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*; *FTC Puts Conditions on Service Corporation International’s Proposed \$1.4 Billion Acquisition of Rival Funeral and Cemetery Services Provider*, FED. TRADE COMMISSION (Dec. 23, 2013), <https://www.ftc.gov/news-events/press-releases/2013/12/ftc-puts-conditions-service-corporation-internationals-proposed> [<https://perma.cc/BS4A-7C8N>].

The Jewish community in Washington, D.C., is among those who are concerned about the merger. “Our community’s funeral home is being taken over by this giant conglomerate,” said Louise Chatlynn, who works with her synagogue’s burial society in Maryland. “It’s jacking up the price and coming between the community and the bereaved.” Chatlynn and Dash were among a small group of protesters outside the FTC’s Washington headquarters on Tuesday. On the sidewalk outside the hulking gray building sat a simple pine casket with a printed sign attached to the front reading, “I CAN’T AFFORD TO DIE.”

Max Strasser, *Nation’s Largest Funeral Company Keeps Growing amid Complaints, Protests*, AL JAZEERA AM. (Nov. 26, 2013, 5:00 AM), <http://america.aljazeera.com/articles/2013/11/26/amid-complaints-protestsnationslargestfuneralcompanykeepsrowing.html> [<https://perma.cc/HZ5B-HBEV>].

services market, SCI may further expand through the purchase of local funeral homes that find themselves constrained because of the COVID-19 pandemic.²⁰³

SCI's stated business plan is to capitalize upon the "goodwill and heritage" of the local family-owned funeral homes that it purchases by continuing operations under their original names.²⁰⁴ The stated business plan, in effect, exploits the consumer's belief that they are doing business with a local company—when, in fact, consumer advocates and funeral industry experts state that SCI funeral homes are among the most expensive.²⁰⁵ A study from the Consumer Federation of America found that median prices at SCI funeral homes were 47 to 72% higher.²⁰⁶ It was also disclosed in this report that no SCI funeral homes disclosed prices online.²⁰⁷

Transparency geared towards protection of the consumer would impose some type of digital-disclosure requirement that the local funeral home disclose that it is not locally owned, despite messaging or branding to that effect. A creeping consolidation is occurring within the death services industry that offers economies of scale to the provider that may not be passed to the consumer because price disclosures are not readily accessible, and the grieving consumer does not engage in price comparison.²⁰⁸ The issue of industry consolidation is clearly outside of the scope of this Article, though it is worthwhile to pause to consider the benefit of transparency to the consumer with regard to entity ownership.²⁰⁹

203. Serv. Corp. Int'l, Annual Report (Form 10-K) (Dec. 31, 2019).

204. *Id.*

205. Strasser, *supra* note 202.

206. JOSHUA SLOCUM, FUNERAL CONSUMERS ALL. & CONSUMER FED'N OF AM., DEATH WITH DIGNITY? A REPORT ON SCI/DIGNITY MEMORIAL HIGH PRICES AND REFUSAL TO DISCLOSE THESE PRICES 2 (2017), https://consumerfed.org/wp-content/uploads/2017/03/3-6-17-Funeral-SCI_Report.pdf [<https://perma.cc/45HN-39VK>].

207. Press Release, Consumer Fed'n of Am., Nation's Largest Funeral Home Company Charges High Prices and Refuses to Disclose These Prices on Their Websites (Mar. 6, 2017), https://consumerfed.org/press_release/nations-largest-funeral-home-company-charges-high-prices-refuses-disclose-prices-websites/?mod=article_inline [<https://perma.cc/22GT-T44C>].

208. Mona Chalabi, *The Rising Cost of Not Living*, N.Y. REV. BOOKS (Dec. 16, 2019, 12:16 PM), <https://www.nybooks.com/daily/2019/12/16/the-rising-cost-of-not-living/> [<https://perma.cc/9S5H-7G4W>] ("What those families rarely realize is that their local funeral home, once run as a 'mom-and-pop' family business, is now probably owned by a Wall Street firm. Service Corporation International, or SCI, for example, operates 1,477 funeral service locations and 483 cemeteries across the country, and is worth \$13.3 billion . . . SCI charges between 40 percent and 75 percent more for its services than independent funeral homes do.")

209. Perhaps disclosure would come in the form of a statement on the website owner of a death services provider (which would be defined for purposes of this Article as exercising

B. *Normalizing Environmentally Friendly Funeral and Burial Options*

The death care services industry is an industry with more than \$20 billion in annual economic activity, employing around 130,000 people, and disposing of more than 1.5 million deceased per year.²¹⁰ Statistics gathered and posted by a funeral director suggest that the gross profit margin for the industry is 62.5% (though the profit margin for an independent funeral home likely runs 10% to 30%).²¹¹

The funeral director plays an extraordinarily important role that can also be self-serving by virtue of position—being an information conduit affords an opportunity to shape funeral custom and consumer demand within this space.²¹² And to the extent that funerary practice has shaped consumer demand in the United States, it has done so in such a way that environmentally toxic practices have become a norm. Although eco-friendly practice is not the focus of this Article, there is a relevant existential equity to “greening up death” when and if green approaches will also reduce expense. To that end, reducing unnecessary expense and shrinking the environmental footprint align with regard to two funeral customs in the United States: use of embalming and vaults.

control and/or owning more than 33% equity interest, directly or indirectly). This type of disclosure is modeled off the Corporate Transparency Act of 2019, passed by the United States House of Representatives on October 22, 2019. See Carl A. Fornaris & Marina Olman-Pal, *U.S. House Passes Bill That Would Require Disclosure of Beneficial Owners of U.S. Corporations and Limited Liability Companies*, NAT'L L. REV. (Oct. 29, 2019), <https://www.natlawreview.com/article/us-house-passes-bill-would-require-disclosure-beneficial-owners-us-corporations-and> [<https://perma.cc/5S45-K44W>].

210. Perianne Boring, *Death of the Death Care Industry and Eternal Life Online*, FORBES (Apr. 25, 2014, 8:00 AM), <https://www.forbes.com/sites/perianneboring/2014/04/25/the-death-of-the-death-care-industry-and-eternal-life-online/> [<https://perma.cc/9VBC-8YDE>].

211. Caleb Wilde, *10 Terrifying Things About Funeral Homes You Didn't Know: A Response*, CONFESSIONS FUNERAL DIR. (Aug. 4, 2017, 4:49 PM), <https://www.calebwilde.com/2017/08/10-terrifying-things-about-funeral-homes-you-didnt-know-a-response/> [<https://perma.cc/XL2H-QX79>]; see also JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* 70 (Vintage Books 2000) (suggesting the undertaker pockets “slightly more than half of the funeral dollar,” supporting an entire industry of “cemeteries, florists, monument makers, [and] vault manufacturers.”).

212. MITFORD, *supra* note 211, at 78 (“Without question, the tremendous advancement in funeral customs in America must be credited to the funeral director and not to the demands of the public, not even ourselves. He has carried on assiduously an educational campaign which has resulted indirectly in a public desire for funeral sentiment and memorialization.”).

Embalming is a violent process whereby, for lack of a better description, we pickle and preserve our loved ones.²¹³ Early Christians and Jews frowned on the Egyptian preoccupation with restoration and preservation as a pagan custom, and it did not gain traction as a funerary practice until this last century.²¹⁴ In modern practice, it is not used for the long-term preservation of the dead,²¹⁵ but instead to preserve cosmetic appearance through funeral services.²¹⁶ Embalming is only required by law in the United States in special, narrow circumstances, on a state-by-state basis.²¹⁷ Alabama and Alaska require embalming when a body crosses the state line and leaves the state.²¹⁸ California, Idaho, Kansas, Minnesota, and New Jersey mandate embalming when a body crosses state lines via common carrier such as train or airplane.²¹⁹ Many states have a time period after which a body must be embalmed or refrigerated.²²⁰ Kansas requires that embalming be done for mausoleum

213. Stephen E. Nash, *The Weird, Wild World of Mortuary Customs*, SAPIENS (Mar. 8, 2018), <https://www.sapiens.org/column/curiosities/embalming-culture-mortuary-customs/> [<https://perma.cc/9H38-MGGA>].

Embalming requires at least 10 steps, including massage to alleviate rigor mortis, “setting the face” (which requires wiring the jaw shut, stitches to hold the lips in place, and “caps” for the eyes, which I still don’t understand) to create the desired expression, and detailed attention to specific problem areas in which gases may have built up within the body. Embalming is an invasive and violent process that results, quite amazingly, in a corpse that appears at rest and at peace. Morticians expertly create a doppelgänger, one that friends and family can view with minimal shock and dismay. Embalming produces an aesthetic veil, a membrane, behind which the violence of death and natural decay are hidden.

Id.

214. MITFORD, *supra* note 211, at 143–44.

215. *Id.* at 54–55 (noting that a body can be preserved for years, “depending upon the strength of the fluids used, and the temperature and humidity of the surrounding atmosphere. Cadavers prepared for use in anatomical research may outlast the hardest medical student. The trouble is, they don’t look very pretty; in fact they tend to resemble old shoe leather.”).

216. *Id.*

217. Embalming is required when a body crosses state lines from Alabama or Alaska, or when a body leaves California, Idaho, Kansas, Minnesota, or New Jersey by common carrier (airplane or train). *Embalming: What You Should Know*, FUNERAL CONSUMERS ALLIANCE (Nov. 26, 2007), <https://funerals.org/what-you-should-know-about-embalming/> [<https://perma.cc/RJS5-AGPN>]; *The FTC Funeral Rule*, FED. TRADE COMM’N (July 2012), <https://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule> [<https://perma.cc/FD7B-KKLLH>].

218. ALASKA ADMIN. CODE tit. 7, § 35.100(c); ALA. CODE § 22-19-2.

219. CAL. HEALTH & SAFETY CODE § 7355(a); IDAHO CODE § 54-1120; KAN. STAT. ANN. § 63-3-11; MINN. STAT. § 149A.93(7); N.J. ADMIN. CODE § 8:9-1.7.

220. *See, e.g.*, ALA. CODE § 34-13-117 (24 hours); MO. CODE REGS. ANN. tit. 20, § 2120-2.070(16) (24 hours); MONT. ADMIN. R. 37.116.103 (48 hours); S.D. ADMIN. R. 20:45:02:07 (24 hours); 035.0001-4 WYO. CODE R. § 5 (36 hours).

interments.²²¹ In Minnesota, embalming is required (in limited circumstances) for a public viewing.²²²

Many funeral directors insist that embalming is necessary for reasons related to mental health or hygiene.²²³ As concerns the former, embalming as a type of grief therapy to ease mental health issues associated with a loss is unsupported by science,²²⁴ and actually raises questions about whether our modern distance from death is profoundly unhealthy (as discussed below).²²⁵ The claim that embalming is necessary for reasons of public sanitation or hygiene is also unsubstantiated.²²⁶ Though embalming may be a common practice in the United States and Canada,²²⁷ it is not the norm in many (if not most) industrialized nations of the world, and no problems connected to the burial of natural remains are arising.²²⁸

221. KAN. ADMIN. REGS. § 63-3-16.

222. MINN. STAT. § 149A.91(3).

223. MITFORD, *supra* note 211, at 54–55.

224. Sallie Tisdale, *How a Common Death Ritual Made It Harder to Mourn the Loss of My Mother*, TIME (Mar. 4, 2019, 8:00 AM), <https://time.com/5542117/death-embalming-preservation-cremation-mourning/> [<https://perma.cc/M4DA-K346>].

[A]fter my mother had been embalmed, we returned . . . I could see my mother in the coffin across the room, and for one very long and strange moment, I thought she was alive again. She looked better than she had for years. Her skin was pink and smooth; her hair, nicely groomed. Even her fingernails were done, and she had a very small smile on her face. I knew she was dead But at that moment, I thought she might sit up and look at me, and a lot of my hard-won acceptance was lost. More than thirty years later, I still resent what was done to her, and to me Embalming and the so-called restorative arts are about denial and, as a result, they unwittingly cause us greater pain.

Id.

225. Jones, *supra* note 26 (“There may be no other rite of passage around which we have become more passive. We carefully vet the doctors or midwives who will deliver our babies. We pore over options for wedding venues and officiants. But often we don’t plan for death. So when it arrives, we take what’s easily available If death practices reveal a culture’s values, we choose convenience, outsourcing, an aversion to knowing and seeing too much”).

226. *Embalming: What you Should Know*, *supra* note 217 (“Embalming provides no public health benefit, according to the U.S. Centers for Disease Control and Canadian health authorities. Hawaii and Ontario forbid embalming if the person died of certain contagious diseases.”).

227. *Id.*

228. See MITFORD, *supra* note 211, at 57.

‘There are several advantages to being dead You don’t excrete, inhale, exhale, or perspire.’ The body of a person who has died of a noncommunicable illness, such as heart disease or cancer, presents no hazard whatsoever [In the case of communicable illness, epidemics have been caused by] seepage from graves into the city water supply The solution, however, lies in city planning, engineering, and sanitation, rather than in embalming, for the organisms which cause disease live in the organs, the blood, and the bowel, and cannot all be killed by the embalming process.

In fact, the European Union (“EU”) has placed restrictions on the use of formaldehyde that may prevent embalming in its present form in the EU²²⁹ and possibly the United Kingdom.²³⁰

The truth of the matter is that abandoning embalming may put an end to the expense of the open-casket funeral.²³¹ Embalming is big business in the United States, with one mortuary textbook author describing the process as “the very foundation of modern mortuary service—the factor which has made the elaborate funeral home and lucrative funeral service possible.”²³² An open-casket funeral creates an opportunity for the funeral home to sell a casket and a splendiferous and magnificent funeral package.²³³ Death services have been professionalized, and with professionalization comes commodification: embalming, flowers, caskets, grave vaults or liners, hearses, mourning clothes, catering, “perpetual care” cemetery plots, and even glamour—along with false narratives to upsell the customer.²³⁴

Id.

229. Stephen Gardner, *Embalmers Face Challenge with EU Formaldehyde Limit*, BLOOMBERG L. (Mar. 27, 2019, 1:34 PM), <https://news.bloomberglaw.com/environment-and-energy/embalmers-face-challenge-with-eu-formaldehyde-limit> [https://perma.cc/8M8B-HT36] (“Embalmers could face the toughest challenge from new European Union Limits on workplace exposure to cancer-causing substances approved by the European Parliament March 27 [2019].”).

230. Cormac Connelly-Smith, *‘Natural Death’ Funeral Directors Welcome EU Formaldehyde Ban*, TALKRADIO (Nov. 23, 2018), <https://talkradio.co.uk/news/natural-death-funeral-directors-welcome-eu-formaldehyde-ban-18112328939> [https://perma.cc/64YB-PWG8] (forecasting that “[i]f the UK remains in the customs union after leaving the EU on March 29 2019, it would be expected to adopt any EU amendments into law.”).

231. Victoria Loe, *Extreme Unctuousness*, TEX. MONTHLY (May 1981), <https://www.texasmonthly.com/articles/extreme-unctuousness/> [https://perma.cc/HVL5-4LVR].

The universal human picklement—well, not universal, really, for it is a peculiarly American custom, shooting up the dead with preservatives . . . Sure, the embalmer and all his craft can keep you odorless and bloat-free long enough for your cousins from Schenectady to fly in for one last loving glimpse. And embalming does allow your grieving family to buy you a special burial suit, lay you in a bronzed, silk-lined coffin, flank you with banks of hothouse posies, and install you in the hushed stateliness of the viewing chamber, where they can gaze upon you to their heart’s content.

Id.

232. MITFORD, *supra* note 211, at 142.

233. *Id.* at 63–64. (“If embalming is taken out of the funeral, then viewing the body will also be lost. If viewing is lost, then the body itself will not be central to the funeral. If the body is taken out of the funeral, then what does the funeral director have to sell?”).

234. A fee for perpetual care is a requirement at many cemeteries. Linnea Crowther, *How Cemeteries Work: Questions About Cemetery Grounds*, LEGACY.COM (Oct. 29, 2018), <https://www.legacy.com/advice/how-cemeteries-work-questions-about-cemetery-grounds/> [https://perma.cc/E3JH-ZX6C]. Perpetual care fees may be assessed with an annual fee or a

It is possible to have a funeral “event” to honor the deceased without the use of embalming,²³⁵ and the rest of the world manages to do so.²³⁶ Natural remains may be preserved for up to three months if maintained between thirty-eight and forty-two degrees Fahrenheit.²³⁷ Consequently, alternatives to embalming that would still facilitate a viewing include refrigeration and cooling equipment such as gel packs, ice packs, or dry ice.²³⁸ Refrigeration equipment such as lockers and beds may be used by funeral homes, and off-site facilities with refrigeration equipment are available to be contracted.²³⁹ Alternatively, cooling agents such as dry ice²⁴⁰ may be placed beneath the body and changed every twenty-four hours.²⁴¹ In the United States, Texas is the only state where refrigeration is not considered an acceptable alternative to embalming.²⁴²

one-time charge. *Id.* The fee pays for the maintenance and upkeep of the cemetery, but not necessarily the individual burial site. *Id.* Maintenance includes things such as mowing, fertilizing, and pest control. *Id.*

235. Nicole Archer, *Funerals Are Expensive, Broken and Exploitative. They Have to Change*, CNET (May 25, 2020), <https://www.cnet.com/features/funerals-are-expensive-broken-exploitative-they-have-to-change/> [<https://perma.cc/8BND-ZA7J>] (“You want a private viewing to say goodbye? That’ll be \$725 . . . for embalming, \$250 for cosmetics and \$425 for use of the space and staff. That’s over \$1,000 before the funeral even starts.”).

236. Tisdale, *supra* note 224.

237. KATHERINE MARIACA-SULLIVAN, *WHEN A LOVED ONE DIES* 86 (2011).

238. Mica Matlack, *Alternatives to Embalming*, FUNERALS 360 (May 10, 2016), <https://www.funerals360.com/blog/cremations/alternatives-to-embalming/> [<https://perma.cc/FS2L-HH9A>]; Daniel Szczesniak, *Embalming Alternatives That Avoid Formaldehyde*, USURNS ONLINE (Jan. 16, 2017), <https://www.usurnsonline.com/burial/embalming-alternatives-avoid-formaldehyde/> [<https://perma.cc/B3LJ-2B2M>].

239. See Matlack, *supra* note 238; *Preservation of the Body Before Placement in the Coffin*, ASS’N FRANÇAISE D’INFORMATION FUNÉRAIRE [hereinafter *Preservation of the Body*], <https://www.afif.asso.fr/english/preservation.htm> [<https://perma.cc/8G2Z-4NRA>].

240. MARIACA-SULLIVAN, *supra* note 237, at 86.

For three-day wakes, we generally use dry ice. It is extremely cold (minus 110 degrees Fahrenheit). We place it under the torso of the body and a small piece on top so it freezes the fluids in the lungs and stomach. We have rarely seen any fluids coming from the mouth or nose because of this. Even when the deceased has purged a little brownish fluid from the mouth (again rare) it has not upset anyone. Families often deal with far more fluids and other matter released from the body when their loved one is in the dying process.

Id.

241. *Preservation of the Body*, *supra* note 239.

242. In Texas, no human body can be held more than 24 hours without being maintained at a temperature within the range of 34 degrees to 40 degrees Fahrenheit or embalmed. 25 TEX. ADMIN. CODE § 181.4. However, if the body is not claimed for burial immediately after death, it must be embalmed within 24 hours. TEX. HEALTH & SAFETY CODE ANN. § 691.025(a). *But see* 22 TEX. ADMIN. CODE § 203.48(a)(2)(A)(iii) (stating that “funeral providers must not represent that a deceased person is required to be embalmed for . . . [a] closed

It is possible that the customer will opt for the same services with or without embalming, and dispensing with the preservation process will not save any expense: perhaps the \$750 fee²⁴³ for preparation of the deceased and embalming will merely be replaced by a \$750 fee for refrigeration.²⁴⁴ Regardless, educating consumers about an unnecessary and toxic practice is a first step in moving death service practice away from expensive, antiquated custom—and the consumer may take comfort in the fact that their deceased loved one is being laid to rest without harming the environment.

A second environmentally tragic, sometimes expensive, and arguably unnecessary funerary practice is the use of vaults in the American cemetery. A burial vault is essentially *a casket for the casket*—it is an outer container in which the casket is placed, so that when the casket decomposes and disintegrates, the ground above the grave does not cave downward.²⁴⁵ These vaults are designed to keep the rolling lawn of modern cemeteries level, and from a practical standpoint, they ensure that the weight of heavy earth-moving equipment used to dig graves does not collapse or implode any existing graves.²⁴⁶ These vaults may simply be made of plain concrete, metal, or polystyrene,²⁴⁷ or alternatively, be or-

casket funeral without viewing or visitation when refrigeration is available . . .”). TEX. FUNERAL SERV. COMM’N, FACTS ABOUT FUNERALS (2019), <http://tfsc.texas.gov/files/News/Facts%20About%20Funerals%20English.pdf> [https://perma.cc/9H88-GH4Z] (“Texas law does not require embalming.”).

243. In 2019, the NFDA estimated the median cost of embalming at \$750. *Statistics*, NAT’L FUNERAL DIRECTORS ASS’N, <https://www.nfda.org/news/statistics> [https://perma.cc/X5A4-3EJ6] (last updated July 18, 2019).

244. MITFORD, *supra* note 211, at 202 (calling to discuss pricing, one funeral director explained that if they skipped embalming at a price of \$425, the consumer would instead be charged \$425 for refrigeration, and that “an unembalmed body can only be viewed by the legal next of kin and then only for a few moments” because of potential liability for the funeral home due to blood-borne pathogens—which is noted by the author as a “dazzling flight[] of fancy”).

245. Michele Mohr, *Standing on Solid Ground*, CHI. TRIB. (May 5, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-05-05-9605050423-story.html> [https://perma.cc/45NY-CXZT].

246. *Id.* (“Older grave sites had begun to sink and, as heavy machinery replaced manual labor, graves sometimes imploded when trucks or other equipment were driven on the grounds. Because the concrete vaults do not deteriorate like wood and are stronger—a top-of-the-line Wilbert vault can withstand up to 7,500 pounds of pressure per square inch—the containers prevented the formation of ridges and depressions that resulted from sinking graves.”).

247. Ralf Heckenbach, *Why Do Cemeteries Insist on Burial Vaults?*, MEMORIALS BLOG (Mar. 18, 2013), <https://www.memorials.com/blog/why-do-cemeteries-insist-on-burial-vaults/> [https://perma.cc/F2X2-XXE3].

nately designed and sealed with plastic or lined with precious metals.²⁴⁸ Burial vaults usually cost between \$900 and \$13,000, though the estimated median cost of a vault by the National Funeral Directors Association in 2019 was \$1495.²⁴⁹

Most cemeteries consider either a burial vault or a grave liner to be a necessity and not a luxury,²⁵⁰ though interestingly, neither the FTC, most state law,²⁵¹ nor federal law requires any type of outer burial container for the casket.²⁵² The cost of a burial vault or grave liner is not insignificant when weighed against the fact that it is not an item required by health or safety laws but is instead a requirement born of funerary custom. To the extent that consumers wish to reduce costs, alternatives are increasingly becoming available. Conservation and natural burial sites²⁵³ around the United States prohibit the use of grave vaults and embalming chemicals and require the use of biodegradable caskets (e.g., paper, cardboard, cotton, wicker, banana leaves, etc.). These spaces forego the use of heavy equipment to mow and dig.²⁵⁴ Though the natural coffins degrade and collapse over time, the depression in the land may then be filled by hand a few times over a six- to eighteen-month period of time (because most properly constructed graves will stop sinking within one to two years).²⁵⁵ These are sustainably managed spaces committed to reintegrating the deceased back into the planet.²⁵⁶

248. Mohr, *supra* note 245 (reporting buyers indicated an interest in less masculine grave vaults, a trend which paved the way for introduction of the “Cameo Rose”—a vault decorated with white and pink, “aimed at the female market.”).

249. See *Statistics, supra* note 243; *How to Choose the Right Outer Burial Container: Burial Vaults and Grave Liners*, EVERPLANS (2020), <https://www.everplans.com/articles/how-to-choose-the-right-outer-burial-container-burial-vaults-and-grave-liners> [https://perma.cc/565K-VXWP].

250. Mohr, *supra* note 245.

251. *Funeral Costs and Pricing Checklist, supra* note 128.

252. *Id.* (referring to an outer burial container as an “optional good[.]”).

253. Since 1993, more than 200 natural burial grounds have been established in the United Kingdom alone, with the idea that human burial will nurture nature. TONY WALTER, *WHAT DEATH MEANS NOW: THINKING CRITICALLY ABOUT DYING AND GRIEVING* 76 (2017).

254. *Going Vault-Free—Request “No Liner” in Your Cemetery Plot*, NAT. BURIAL CO., <https://www.naturalburialcompany.com/vault-free-burials/> [https://perma.cc/CNE5-RP9D].

255. *Id.*

256. *Id.*

C. *Preserving Dignity Through a Menu of Less Expensive Options*

There is a limited menu of low-cost alternatives for lower- and middle-class families who wish to avoid the crushing financial burden of a traditional funeral and burial. In a marketplace where demand is generally inflexible, with a set number of deaths per year, developing a menu of fixed-price, high-quality, low-cost options for death services would be a meaningful service to the grieving consumer.

The richer and/or more educated that one is, the more likely they are to be cremated versus buried, and cremation involves considerably less expense.²⁵⁷ To that end, the first option on any such menu would be direct cremation. “According to the Cremation Research Council, the average cost of a direct cremation is \$1100.”²⁵⁸ Direct cremation involves no viewing, wake, or visitation—though a memorial service may be conducted by family or friends at some later date.²⁵⁹ The consumer is never required to purchase a casket for cremation under the Funeral Rule,²⁶⁰ thereby avoiding the expense of the single-most expensive item that one will usually purchase for a traditional funeral.²⁶¹ Most funeral homes do not have their own crematoriums, which means that a transportation fee will likely be charged to transfer the remains, unless the services of the crematory²⁶² are engaged directly after death.²⁶³ The crematory staff are usually able to handle administrative issues such as attending to the death certificate and arranging transportation of the deceased directly to the crematory, often at considerably less

257. CURRID-HALKETT, *supra* note 174, at 34.

258. *What Is the Cost of Human Cremation?*, CREMATION RES., <https://www.cremationresource.org/cremation/what-is-the-cost-of-human-cremation.html> [<https://perma.cc/4JQG-ZPJ4>].

259. *5 Things You Need to Know About Direct Cremation*, EVERPLANS, <https://www.everplans.com/articles/5-things-you-need-to-know-about-direct-cremation> [<https://perma.cc/HJ3Q-G5J2>].

260. A crematory or funeral provider may not represent that state or local law requires a casket for direct cremations. 16 C.F.R. § 453.3 (2020). This rule, along with other regulations adopted by the FTC, is generally referred to as the “Funeral Rule.” See *The FTC Funeral Rule*, *supra* note 217.

261. *Funeral Costs and Pricing Checklist*, *supra* note 128.

262. The Cremation Association of North America describes crematoriums and crematoriums as “[t]he building[s] that house[] the cremation chamber(s). [They] can be . . . building[s] that serve[] this one function or . . . multi-purpose building[s] that also contain[] administrative offices, mortuary preparation rooms, or cemetery maintenance facilities.” *Cremation Process*, CREMATION ASS’N N. AM., <https://www.cremationassociation.org/page/CremationProcess> [<https://perma.cc/4BDJ-3ZA9>].

263. *What Is the Cost of Human Cremation?*, *supra* note 258.

expense than if a funeral director was involved.²⁶⁴ This \$1100 average cost of direct cremation does not include any cemetery costs, such as the cost of interring the cremated remains in a columbarium niche.²⁶⁵ To the extent that the performative aspect of death celebration is important, a memorial service can be arranged at some later time and without involvement of the death care community.

A second option is green burial. Although green burial is not as inexpensive as direct cremation, it often costs far less than traditional burial, with average costs ranging from \$1000 to \$4000.²⁶⁶ Costs for a green burial include a burial plot in a green cemetery, applicable permits, opening and closing the grave, a simple stone marker (or no marker at all, depending on cemetery rules), an honorarium for a spiritual service, and a biodegradable burial vessel such as a cardboard casket or a burial shroud.²⁶⁷ Further, one pays homage to the transcendental notion that one's last act on earth need not be to pollute it.²⁶⁸

A third option is the home funeral (and possibly a home burial). A home funeral can mean a range of different things, but generally refers to a process in the home where the deceased is cared for by loved ones.²⁶⁹ Family or friends are responsible for keeping the remains chilled, completing administrative tasks (e.g., death certificate and burial permits), and/or transporting the deceased to the

264. See *id.*; *Death Certificates Explained*, CREMATION SOC. AM., <https://www.cremationsocietyofamerica.com/death-certificates-explained/> [<https://perma.cc/RN2P-LNWN>]

265. *What Is the Cost of Human Cremation?*, *supra* note 258.

266. Danielle Solomon, *How Much Does a Funeral Cost?*, CAKE (Jan. 29, 2020), <https://www.joincake.com/blog/cost-of-a-funeral/> [<https://perma.cc/7NDT-AAFK>].

267. Kate Wight, *Average Cost of a Natural (Green) Burial: A Price Breakdown*, CAKE (Oct. 18, 2019), <https://www.joincake.com/blog/natural-burial-cost/> [<https://perma.cc/3PJT-Z78R>]. Cardboard caskets are the least expensive option, ranging from \$50 to \$500. *Id.* Other options include soft wood caskets such as pine, oak, or maple (starting at \$500). *Id.* Woven bamboo or sea grass coffins start at a cost of \$1000. *Id.* Burial shrouds will usually cost between \$200 and \$1000. *Id.*

268. See, e.g., Robert Schroeder, *Why More Americans Are Considering 'Green' Funerals*, MARKETWATCH (Dec. 26, 2015, 10:55 AM), <https://www.marketwatch.com/story/why-more-americans-are-considering-green-funerals-2015-10-29> [<https://perma.cc/65EK-6PJ6>] ("The self-described nature-lover, vegan and bird-watcher, who is 60 and healthy, says she aims to do as little harm to the environment as possible.")

269. See generally *What Is a Home Funeral?*, NAT'L HOME FUNERAL ALLIANCE, <https://www.homefuneralalliance.org> [<https://perma.cc/96LF-XDZ>].

burial grounds or crematory.²⁷⁰ Proponents of home funerals believe that they are “simultaneously tragic and beautiful,”²⁷¹ and being less passive in the funeral process allows more time for closure and coming to terms with the passage of a loved one.²⁷² Each state has different legal requirements with regard to how a home funeral can happen,²⁷³ though home funerals are more or less available in every state.²⁷⁴ The concept of a home funeral runs contrary to the modern notion of death as an emergency and the idea that the funeral must be a highly mediated and disinfected process.²⁷⁵

D. *Increasing Death Visibility*

There has been a shift over the past century from an Old Testament approach of “for dust thou art, and unto dust shalt thou return”²⁷⁶ to honoring the deceased by delaying decomposition with environmentally destructive practices that include waterproof, satin-lined caskets, concrete grave vaults, gallons of toxic embalming fluid, and lush park-like manicured cemeteries.²⁷⁷ Rejecting

270. *See id.*

271. NANCY BERNS, CLOSURE: THE RUSH TO END GRIEF AND WHAT IT COSTS US 61–62 (2011) (“In 1995, [Elizabeth’s] seven-year-old daughter Alison died in a car accident. Refusing to turn over her body to strangers, Elizabeth found a way to take care of her daughter with the help of a funeral director who showed her how. She describes the process: ‘I cared for her at home for three days, bathing her, watching her, taking in slowly the painful reality that she has passed from this life, and sharing my grief with her classmates and brothers and grandparents and our wonderful community of friends, before finally letting go of her body.’”).

272. Jones, *supra* note 26 (“There may be no other rite of passage around which we have become more passive. We carefully vet the doctors or midwives who will deliver our babies. We pore over options for wedding venues and officiants. But often we don’t plan for death If death practices reveal a culture’s values, we choose convenience, outsourcing, an aversion to knowing and seeing too much.”).

273. *See generally* Josh Slocum & Lee Webster, *Quick Guide to Home Funerals by State*, NAT’L HOME FUNERAL ALLIANCE, <https://www.homefuneralalliance.org/state-requirements.html> [<https://perma.cc/QU4P-W4VT>].

274. There are exceptions, of course, such as when contagious disease is involved. Further, some states require the involvement of a funeral director to supervise transportation of remains and file the death certificate. For a complete list of state requirements, *see id.*

275. Rebecca Mead, *Our Bodies, Ourselves*, NEW YORKER (Nov. 23, 2015), <https://www.newyorker.com/magazine/2015/11/30/our-bodies-ourselves> [<https://perma.cc/YB9N-ZTP8>] (“The conventional funeral industry has given people the impression that death is an emergency. ‘But death is *not* an emergency,’ [according to Caitlin Doughty]. ‘Death is the opposite of an emergency. Look at the person who died—all that stress and pain is gone from them. And now that stress and pain can be gone from you.’”).

276. *Genesis* 3:19 (King James).

277. *See* Chavez, *supra* note 20 (noting that design of cemeteries is done in such a way

the notion that white patriarchy has spent the past century hiding and profiting from a significant, deeply personal, organic event, the “death-positive movement” in the United States has emerged.²⁷⁸ Normative, traditional funerary expenditures are now being called into question as not necessarily necessary.

As a process, death has three distinct phases: the dying person’s acceptance at the moment of the event, the moment of farewell, and the aftermath and mourning.²⁷⁹ Death itself has largely been banished from all phases of death in North America.²⁸⁰ Although most people know and accept that burial planning is important, they fail to do so. Financial products and approaches to facilitate pre-need prepayment are generally not recommended.²⁸¹ Those who are dying are often shuttled to facilities and hospitals and moved out of sight.²⁸² The ceremony of any aftermath and mourning process are also contracted out to a professional.²⁸³ The identifiable hearse has been replaced with the nondescript limousine, and newspapers are largely unread, gradually rendering published obituaries obsolete. We “no longer observe[] a pause,” and there is little to no pause in the continuity of our lives to recognize the event itself.²⁸⁴ The pain of loss still exists within the hearts of loved ones, but it has largely been eliminated from our public space. We ignore death,²⁸⁵ outsource having to deal with death ourselves, and

so as to avoid inconveniencing anyone “by reminders that corpses lay in repose 6 feet under.”).

278. *See id.*

279. Phillippe Ariès, *Invisible Death*, 5 WILSON Q. 105, 105 (1981).

280. *Id.* at 106.

281. *See, e.g.*, Selena Maranjian, *Think Twice About “Pre-Need” Funeral Insurance*, MOTLEY FOOL (Nov. 19, 2014, 8:00 AM), <https://www.fool.com/investing/general/2014/11/19/think-twice-about-pre-need-funeral-insurance.aspx> [https://perma.cc/C25H-BYJ4]; Anthony Martin, *11 Reasons to Avoid Prepaid Funeral Plans & What to Do Instead*, CHOICE MUT., <https://choicemutual.com/prepaid-funeral-plans/> [https://perma.cc/NJG3-UVHP] (last updated Sept. 26, 2020); Leanne Potts, *Smart Ways to Cover the Costs of a Funeral*, AARP (July 7, 2020), <https://www.aarp.org/home-family/friends-family/info-2017/funeralpayment-options-fd.html> [https://perma.cc/Y3ZA-TJKS]; *Should You Prepay for Your Funeral? Safer Ways to Plan Ahead*, FUNERAL CONSUMERS ALLIANCE, <https://funerals.org/?consumers=should-you-prepay-for-your-funeral> [https://perma.cc/4UG4-EFJS].

282. Ortiz, *supra* note 19 (noting the modern aversion to any discussion of death).

283. MICHAEL CLARKE, CHALLENGING CHOICES: IDEOLOGY, CONSUMERISM AND POLICY 168 (2010).

284. Ariès, *supra* note 279, at 106.

285. Chavez, *supra* note 20 (“[T]he aversion Americans have toward death and corpses is not common elsewhere. Where we’ve created a hard boundary between ourselves and death, for most of the world a softer line exists, creating space for the living to work through their grief, begin to comprehend death . . .”).

pay for services that will assist us with viewing the deceased as asleep rather than dead.²⁸⁶

While the ancient Greeks and Romans would publicly debate and ponder the meaning of an honorable and dignified death, modern society goes to considerable lengths to hide aging and death, so much so that we are left with little emotional bandwidth to discuss our own deaths.²⁸⁷ As discussed above, important choices are left unmade and detailed planning is forsaken.

Creating paths by which the vulnerable consumer may be less vulnerable will assist with addressing the issue of funeral poverty. Death visibility allows for increased awareness of death and the need for pre-planning, which allows the family to save over time for inevitable expense. A core tenet of the death-positive movement is that hiding death and dying does more societal harm than good.²⁸⁸ The death-positive movement embraces the neutral acceptance of an organic, necessary transition in the cycle of life, with the goal of making death more visible and less fearsome.²⁸⁹ This mission to “end our deliberate estrangement from the dead body”²⁹⁰ seems at least partially to credit for recent conversations about death doulas, home funerals, death cafés, and increased involvement at funeral homes.²⁹¹ Technology has also embraced the death-positive movement, with mindfulness apps such as WeCroak reminding users of the inevitability of death randomly through the day,²⁹² Once I’ve Gone recording final wishes, Ever Loved offering

286. Jones, *supra* note 26.

287. CLARKE, *supra* note 283, at 170.

288. *Death Positive*, ORD. GOOD DEATH, <http://www.orderofthegooddeath.com/death-positive> [<https://perma.cc/C4MK-6NKK>].

289. Heller, *supra* note 49 (discussing “death doulas (caring for the terminally ill), death cafes (to discuss life’s last chapter over cake and tea), death celebrants (officiants who lead end-of-life events), living funerals (attended by the honored while still breathing), and end-of-life workshops (for the healthy who think ahead).”).

290. Mead, *supra* note 275.

291. Stephanie Booth, *How the Death Positive Movement Is Coming to Life*, HEALTHLINE (Mar. 27, 2019), <https://www.healthline.com/health-news/the-death-positive-movement#What-does-that-look-like,-exactly?> [<https://perma.cc/9ZVA-MD3R>].

292. Bianca Bosker, *The App That Reminds You You’re Going to Die*, ATLANTIC (Jan./Feb. 2018), <https://www.theatlantic.com/magazine/archive/2018/01/when-death-pings/546587/> [<https://perma.cc/HX2C-NS6Q>].

memorial pages, Qeepr offering an interactive storytelling platform,²⁹³ and Countdown to Zero displaying your remaining life expectancy.²⁹⁴

E. *Broadening Access to Innovative Death-Service Technology*

On Monday, February 24, 2020, Kobe and Gianna Bryant's memorial service was livestreamed online for viewers from around the world.²⁹⁵ On March 13, 2020, President Donald J. Trump declared the COVID-19 outbreak in the United States constituted a national emergency (effective March 1, 2020).²⁹⁶ Although some funeral providers had already considered use of livestream technology to make services available for those unable to travel to attend,²⁹⁷ Kobe's memorial service followed shortly thereafter by the pandemic marks necessity breeding invention—successive events that have caused the death services industry to lean heavily upon technology to offer innovative alternatives to traditional approaches, such as the livestreaming of a funeral.²⁹⁸

There has never been a single form of American funeral, likely due to the heterogeneous groupings that comprise our population, each attached to varied ethnic and religious customs.²⁹⁹ Our system is currently one of rich and evolving variety, and the funeral of the future should also make available a panoply of new and af-

293. Peter Billingham, *8 Digital Legacy Death Apps That Can Make You Immortal*, DEATH GOES DIGITAL, <https://www.deathgoesdigital.com/blog/2016/8-death-apps> [https://perma.cc/S4EU-4YZC].

294. Joyce Alla, *Death . . . There's an App for That*, BUCKET, <https://thebucket.com/dying-well/death-theres-an-app-for-that/> [https://perma.cc/6EHH-MWF4] (“The app also estimates your life in terms of events, for example, how many more weekends do you have? How many meals will you enjoy? Or, how many sunrises?”).

295. *Kobe Bryant Memorial Live Stream: How to Watch Service Online*, NBC SPORTS (Feb. 23, 2020, 1:48 PM), <https://www.nbcsports.com/bayarea/warriors/kobe-bryant-memorial-live-stream-how-watch-service-online> [https://perma.cc/BPQ5-25NT].

296. Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> [https://perma.cc/5GDQ-KHAM].

297. Helman, *supra* note 196 (“Currently SCI isn’t charging customers for livestreaming services, but ultimately Ryan [chief executive of SCI] figures that livestreams are an add-on customers might be willing to pay around \$300 for, and the option will be available even when social distancing is no longer necessary.”).

298. See Wells, *supra* note 104 (reporting survey results that 40% of consumers expected livestreaming to continue, but only 21% would pay an add-on fee for it).

299. Dawson et al., *supra* note 120, at 130.

fordable options for the consumer. A market barrier to development of new, affordable death-service technology exists in the form of state law and regulation that unnecessarily imposes costs and preserves the status quo. Two areas in which the law regulates the funeral industry are of particular concern: Ready-to-Embalm Laws and Abuse-of-Corpse Laws.

Ready-to-Embalm Laws are an interesting study in preservation of the status quo and limitation of competition in the name of consumer protection.³⁰⁰ In 1945, Arizona enacted a consumer-protection regulation aimed at protecting the public from poor-quality embalming.³⁰¹ This regulation came at a time when most funeral homes were family owned, open-casket viewings were the norm,³⁰² and an in-house embalming facility was necessary because of market demand.³⁰³ Thirty-eight states followed in quick succession, enacting some version of a “ready-to-embalm” law.³⁰⁴ Twenty-three of these states require that all funeral directors be licensed embalmers and all funeral homes have embalming facilities.³⁰⁵ Thirteen states require only the embalming room portion of this requirement,³⁰⁶ and alternatively, only Iowa and the District of Columbia

300. #punintended.

301. David E. Harrington, *Markets: Preserving Funeral Markets with Ready-to-Embalm Laws*, J. ECON. PERSPS., Fall 2017, at 201.

302. David E. Harrington & Jaret Treber, *Numbers Matter: Estimating the Cost of State Funeral Regulations*, 8 WAKE FOREST J.L. & POL'Y 29, 30 (2018).

303. *Id.*

304. *Id.* at 34 (citing Harrington, *supra* note 301, at 202) (noting that David E. Harrington coined the term “ready-to-embalm laws”).

305. These states include Arizona, Connecticut, Delaware, Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. See ARIZ. REV. STAT. ANN. §§ 32-1322, -1382; CONN. GEN. STAT. §§ 20-222(b), -223; DEL. CODE ANN. tit. 24, §§ 3107(a)(1)–(2), 3117(g); GA. CODE ANN. §§ 43-18-41(c), -70(b)(2); 225 ILL. COMP. STAT. 41/10-10, 15-55; IND. CODE § 25-15-14-3(b); 832 IND. ADMIN. CODE 5-1-4(b); ME. STAT. tit. 32, § 1501; MASS. GEN. LAWS ch. 112, § 83; 239 MASS. CODE REGS. 3.06(1)(d); MICH. COMP. LAWS §§ 339.1806, .1809; MINN. STAT. §§ 149A.20, .50(2); NEB. REV. STAT. § 38-1414; 172 NEB. ADMIN. CODE § 68-008.01(B); N.H. REV. STAT. ANN. § 325:14(I); N.H. CODE ADMIN. R. ANN. Frl 701.01; N.J. STAT. ANN. § 45:7-48; N.J. ADMIN. CODE § 13:36-5.5(a); N.M. STAT. ANN. §§ 61-32-9, -11(A)(2)(c); N.Y. PUB. HEALTH LAW § 3421; N.Y. COMP. CODES R. & REGS. tit. 10, § 77.5(c)(2); N.D. CENT. CODE § 43-10-10; N.D. ADMIN. CODE 25-02-01-03; 63 PA. CONS. STAT. § 479.3; 49 PA. CODE § 13.94; 5 R.I. GEN. LAWS §§ 5-33.2-6, -12; UTAH CODE ANN. § 58-9-302; UTAH ADMIN. CODE r. 156-9-401(3)(a); VA. CODE ANN. § 54.1-2813; 18 VA. ADMIN. CODE § 65-20-540(A); W. VA. CODE § 30-6-9(a)(1); W. VA. CODE R. § 6-1-13.1.1; WIS. STAT. §§ 445.045, .105(c); WYO. STAT. ANN. §§ 33-16-516(c), -517.

306. These states include Alabama, Arkansas, Florida, Kansas, Louisiana, Mississippi, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas. See ALA. CODE § 34-13-113(a)(4); ARK. CODE ANN. § 17-29-304(e)(1); FLA. STAT. § 497.380(1);

require that a funeral director be licensed to embalm.³⁰⁷ Although these laws are becoming outmoded, there are only eleven states without this kind of market-restricting regulation.³⁰⁸

In those states that separate the funeral director's license from embalming licensure, the embalming educational requirements take an average of 1.3 years of additional education to complete.³⁰⁹ In the states that require funeral homes to maintain embalming rooms, the funeral home must invest in specialized drainage systems, ventilation, and supplies.³¹⁰ The Arizona Auditor General estimated in 2003 that these rooms cost \$10,000 to \$35,000, while also noting that the rooms were "outdated" for current funerary practice.³¹¹ Another source considered the substantial resources invested in an embalming prep room as ranging from \$30,000 (for a single-prep room) to \$50,000 (for a triple-station room).³¹²

The additional costs imposed by the "ready-to-embalm" laws—in the form of additional educational requirements and/or maintenance of facilities—are not insignificant.³¹³ Harrington estimated in 2007 that these laws increase the costs of simple cremations by \$313 and burials by \$546.³¹⁴ Driving increased cost in the name of quality embalming is arguably inefficient and wasteful given that cremation is notably trending in the United States as the leading death care service, increasing from 31.2% in 2004 to 54.6% in

KAN. STAT. ANN. § 65-1713a(a); LA. STAT. ANN. § 37:842(F); LA. ADMIN. CODE tit. 46, § 37:1107(B)(2); MISS. CODE ANN. § 73-11-55(4)(a); NEV. REV. STAT. § 642.016; N.C. GEN. STAT. § 90-210.27A(a); OKLA. STAT. tit. 59, § 396.3(C); OKLA. ADMIN. CODE § 235:10-3-2(5); S.C. CODE ANN. REGS. 57-10(B)(2); S.D. CODIFIED LAWS § 36-19-28; TENN. CODE ANN. § 62-5-313(b)(2); TEX. OCC. CODE ANN. § 651.351(d)(5).

307. See D.C. CODE § 3-405(a)(3); IOWA CODE § 156.4(2).

308. These states are Alaska, California, Colorado, Hawaii, Idaho, Kentucky, Missouri, Ohio, Oregon, Vermont, and Washington. See ALASKA STAT. § 08.42.020; CAL. BUS. & PROF. CODE § 7616(a)(1), (2); COLO. REV. STAT. §§ 12-135-103 to -104; HAW. REV. STAT. § 469-1; IDAHO CODE §§ 54-1109, -1111; KY. REV. STAT. ANN. §§ 316.030, .125; MO. REV. STAT. § 333.041(1); OHIO ADMIN. CODE § 4717-7-02(D)(2); OR. ADMIN. R. 830-040-0020(6); VT. STAT. ANN. tit. 26, § 1252(a)-(b); WASH. ADMIN. CODE § 308-48-031.

309. Foos, *supra* note 30, at 1388-89.

310. *Id.* at 1390-91.

311. *Id.* at 1391-92.

312. See Duncan Stuart Todd, *The Worth of the Prep Room*, DUNCAN STUART TODD (Feb. 1, 2016), <https://duncanstuarttodd.com/the-worth-of-the-prep-room/> [<https://perma.cc/7TPU-KT5Z>].

313. Harrington, *supra* note 301, at 202 ("Ready-to-embalm laws increase costs for all firms selling funeral services . . .").

314. *Id.* at 204.

2019.³¹⁵ The rate of cremation is estimated to increase to almost 80% by 2040.³¹⁶ Direct cremation without use of embalming³¹⁷ was estimated to comprise 72% of cremations in 2014.³¹⁸

A second way in which the law may impose unnecessary costs and reinforce the status quo may be occurring through a set of statutes colloquially referred to as “abuse-of-corpse” laws.³¹⁹ These laws vary from state to state but generally criminalize treatment of human remains in any way that would offend “ordinary family sensibilities.”³²⁰ Abuse-of-corpse laws exist to prevent a corpse from being mistreated, molested, or maimed—e.g., necrophilia, public exhibition, private display.³²¹ Interestingly, the laws may also create unnecessary barriers to entry in this marketplace for entrepreneurs, and in doing so, implicitly stymie capital invested into this space.³²² The breadth of this topic is outside the scope of this Article simply because it deserves its own individual treatment, but a recent example illustrates the issue.

A promising (but early-stage, theoretical) funeral technology known as promession has not yet come to market in the United

315. *Industry Statistical Information*, CREMATION ASS'N N. AM., <https://www.cremationassociation.org/page/IndustryStatistics> [<https://perma.cc/965S-MHF3>].

316. Jeanne Croteau, *By 2040, Nearly 80% Will Be Cremated—Why We Need to Start Talking About It*, FORBES (Aug. 30, 2019), <https://www.forbes.com/sites/jeannecroteau/2019/08/30/by-2040-nearly-80-will-be-cremated—why-we-need-to-start-talking-about-it/#2569f15368d3> [<https://perma.cc/Q8EF-MEJ6>].

317. Dawson et al., *supra* note 120, at 143 (recounting that visiting and viewing of the body and embalming was more common for burials as opposed to cremations—75% and 64% versus 22% and 14%, respectively).

318. NAT'L FUNERAL DIRS. ASS'N, 2015 NFDA CREMATION AND BURIAL REPORT: RESEARCH, STATISTICS AND PROJECTIONS 2 (July 10, 2015), <https://iogr.memberclicks.net/assets/docs/2015%20nfda%20cremation%20and%20burial%20report.pdf> [<https://perma.cc/3S7P-KLU4>].

319. CAITLIN DOUGHTY, WILL MY CAT EAT MY EYEBALLS?: BIG QUESTIONS FROM TINY MORTALS ABOUT DEATH 15 (2019) (“Because of abuse of corpse laws, nobody’s dead body can be *claimed* as property. ‘Finder’s keepers’ doesn’t apply here. But unfortunately, those same abuse of corpse laws prevent you from plopping Mom’s skull on your bookcase.”).

320. This language is included in the Kentucky statute. Caitlin Doughty, *You Can’t Keep Your Parents’ Skulls*, ATLANTIC (Sept. 4, 2019), <https://www.theatlantic.com/science/archive/2019/09/why-you-cant-display-your-relatives-skull/597307/> [<https://perma.cc/5J9D-2MBR>].

321. *Id.* (“Then there are cases like that of Julia Pastrana, a 19th-century Mexican woman with a condition called hypertrichosis, which caused hair to grow all over her face and body. After she died, her husband saw that there was money to be made by displaying Pastrana in freak shows, so he took her embalmed and taxidermied corpse on world tour. Pastrana had ceased to be regarded as human; her corpse had become a possession.”).

322. See generally Tanya D. Marsh, *Regulated to Death: Occupational Licensing and the Demise of the U.S. Funeral Services Industry*, 8 WAKE FOREST J.L. & POL'Y 5 (2018).

States. Promession is an innovative process conceived by Swedish biologist Susanne Wiigh-Mäsak by which a corpse is essentially freeze-dried and shattered to dust: the human remains are exposed to temperatures below negative 196 degrees Celsius,³²³ all fluid is removed through this exposure, the remaining solid is frozen and brittle (because the human body is approximately 75% water),³²⁴ and mechanical vibration is applied to reduce the frozen solid to granules.³²⁵ The theory underlying this process is that remains will be recycled³²⁶ into granules that are nutrient-rich and nurturing to plant life.³²⁷ A company was formed to explore commercial interest, and a number of representatives are working in the United States with the goal of developing markets and legalizing the technology.³²⁸

It was thought that promession would satisfy the Kansas definition of cremation and be legal without a need for any change in existing law.³²⁹ Fire-based cremation reduces remains to ash whereas promession uses vibration to reduce a freeze-dried solid into “crystallized body particles.”³³⁰ In November 2019, Kansas Attorney General Derek Schmidt issued a decision³³¹ that promession does not satisfy existing legal requirements for cremation as defined by state law.³³² This leaves promession without legal ground

323. The corpse is more or less turned into a popsicle. JACQUELINE ELAM & CHASE PIELAK, *CORPSE ENCOUNTERS: AN AESTHETICS OF DEATH* 148 (2018).

324. Nicholas Tufnell, *Freeze-Drying the Dead Could Help Save the Planet*, WIRED (Oct. 14, 2013), <https://www.wired.co.uk/article/promessa> [<https://perma.cc/JT7A-KPZ3>] (“Within a week and a half after death, the corpse is frozen to minus 18 degrees Celsius and then submerged in liquid nitrogen. This makes the body very brittle and vibration of a specific amplitude transforms it into an organic powder that is then introduced into a vacuum chamber where the water is evaporated away.”).

325. ELAM & PIELAK, *supra* note 323, at 149.

326. *Id.*

327. See Amy Houchin, *Promession: The Most Ecological Way to Bury Our Dead?*, ANTHROPOLOGICAL PERSPS. ON DEATH (Apr. 3, 2017), <https://scholarblogs.emory.edu/grave-matters/2017/04/03/promession-the-most-ecological-way-to-bury-our-dead/> [<https://perma.cc/8RZY-58BS>].

328. In November 2019, the Kansas Attorney General issued a legal opinion setting forth that promession did not fall within the state definition of cremation. Jonathan Shorman, *Can You Get Your Body Vibrated into Particles When You Die? Debate Unfolds in Kansas*, WICHITA EAGLE (Nov. 30, 2019, 5:00 AM), <https://www.kansas.com/news/politics-government/article237888864.html> [<https://perma.cc/4QVD-6MU3>]. This is the first state in which an opinion was sought because Kansas has a comparatively broad definition of what constitutes cremation. *Id.*

329. *Id.*

330. See No. 2019-9, Op. Kan. Att’y Gen. (2019).

331. *Id.*

332. Michael Waters, *The Future of Death Tech Has No Rules—Yet*, WIRED (Jan. 24,

to be offered to consumers within the state of Kansas unless existing law is amended and expanded, and it may leave other potential death-tech startups leery. The law stands as a barrier to experimenting and developing innovative, green death technologies. Although some regulating laws are meant to protect the consumer,³³³ such laws also create barriers to entry that protect those currently operating within the industry.³³⁴ The notion of regulatory capture in the death services industry is a subject worth exploring on another day.³³⁵

F. *Access to Reliably and Ethically Managed Pre-Need Planning Options*

There are two types of death planning: planning before death (pre-need) or planning after death (at-need).³³⁶ A decedent may only be an active participant, in terms of planning or payment, if she engages in pre-need planning. Pre-need planning may involve merely specifying preferences as to death care services, or it may include both pre-arrangement and pre-payment for preferred services.³³⁷ Either approach may spare survivors the burden of making unfamiliar, time-sensitive, expensive decisions.³³⁸ Although modern law is deferential to pre-need planning in the form of pref-

2020), <https://www.wired.com/story/the-future-of-death-tech-has-no-rulesyet/> [https://perm a.cc/6XGD-WX35] (“His reasoning reads a bit like science fiction and a bit like a rabbi’s parsing of biblical law. Schmidt argued, for instance, that cremation requires ‘the separation of flesh from bone by the destruction of the flesh’. Promission certainly could be said to destroy the flesh, but the crystallization process doesn’t really separate it from the bone. In that sense, Schmidt concluded that Kansas could not treat it as cremation.”).

333. See BUREAU OF CONSUMER PROT., FUNERAL INDUSTRY PRACTICES 4 (1978) (“Consumer choice has been further diluted by industry efforts to suppress inexpensive alternatives to complete funeral services.”).

334. See Marsh, *supra* note 322, at 26.

335. Regulatory capture refers to a close relationship that exists between regulators and industry, and usually focuses on the (negative) concern that regulators have become the puppets of a specific industry. It is a topic that has been discussed since at least the 1950s. Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570–71, 580 (2012).

336. MARSH, *supra* note 56, at 75.

337. *Id.*

338. See Pearl, *supra* note 90 (“I would rather tell my family to stick me in a bag and toss me into the woods (which is legal in my state) than have them ask for money online to fill a funeral director’s coffers.”).

erences set forth in a testamentary instrument, a substantial minority of decedents have pre-planned and pre-paid for death care services.³³⁹

Accepted wisdom is that the living should not pre-pay for death care services, specifically because pre-paid arrangements seem to present more problems than solutions.³⁴⁰ Because the Federal Trade Commission's Funeral Rule does not apply to pre-need funeral arrangements, and it is an area that is regulated by each individual state, the level of consumer protection varies dramatically from state to state.³⁴¹ Next-of-kin may be prohibited from amending the pre-paid arrangements, and circumstances may have changed such that it is necessary to amend arrangements.³⁴² The funeral home may choose to provide only some of the contracted goods or arrangements—feeling financial pressure because costs inflated since the time of the original contract.³⁴³ Further, as a practical matter, the decedent may have pre-arranged and pre-paid for death services but then failed to communicate these plans to any survivors.³⁴⁴ Because there is often no annual reporting requirement to the purchaser, there is also no paperwork regularly mailed to the purchaser that would assist survivors in realizing that pre-planning occurred.³⁴⁵

339. See Ann M. Murphy, *Please Don't Bury Me Down in That Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 400 (2007).

340. Pat McKeough, *Hidden Risks of Prepaid Funerals*, TSI NETWORK (July 2, 2020), <https://www.tsinetwork.ca/daily-advice/wealth-management/hidden-risks-investing-money-prepaid-funerals/> [<https://perma.cc/9GGW-MM5F>] (noting the pertinence of this information during the COVID-19 pandemic and listing drawbacks of prepaid funerals: prepaid funerals limit options and they may not raise as much as anticipated); Robert Patrick, *Father, Son Plead Guilty in St. Louis Prepaid Funeral Scam Case*, ST. LOUIS TODAY (July 4, 2013), https://www.stltoday.com/news/local/crime-and-courts/father-son-plead-guilty-in-st-louis-prepaid-funeralscam-case/article_64cc95bc-a953-5881-a5b5-fe55c3741b65.html [<https://perma.cc/GC8M-RNEB>] (recounting how a father and son engaged in a prepaid funeral ponzi scheme that “affected up to 150,000 customers who paid up to \$10,000.”); *Prepaid Funeral Scam: Fitting End to Multi-State Fraud Scheme*, FBI NEWS (Jan. 17, 2014), <https://www.fbi.gov/news/stories/prepaid-funeral-scam> [<https://perma.cc/Z9DE-53EL>] (describing events of a prepaid funeral, stating the scam involved “[s]camming nuns. Taking advantage of the mentally disabled. Stealing from the elderly.”).

341. Tracy E. Smith, *Scamming the Elderly: A Look into Funeral Fraud*, 24 GPSOLO 16, 16–17 (2007) (listing inconsistent consumer protection as a drawback to prepaid funeral arrangements).

342. LISA CARLSON & JOSHUA SLOCUM, *FINAL RIGHTS: RECLAIMING THE AMERICAN WAY OF DEATH* 427 (2011).

343. Smith, *supra* note 341, at 16–17.

344. Burley, *supra* note 9.

345. CARLSON & SLOCUM, *supra* note 342, at 427–28.

There are two primary options for pre-need death services financing: pre-need trusts and pre-need insurance policies.³⁴⁶ Both options are regulated at the state level with regulation varying wildly.³⁴⁷ When the pre-need consumer decides that he wants to pay in full for pre-arrangement through a funeral home, most states require that the funds be placed into a trust account.³⁴⁸ A funeral trust is defined by the Internal Revenue Service as a “pooled income fund” established by a funeral home to cover death service expenses, with the funeral home as the beneficiary of the trust.³⁴⁹ The funeral home, or a state or local funeral association, may serve as trustee of the trust.³⁵⁰ Pre-need insurance policies may also be utilized to fund pre-payment arrangements in all states but New York and Alaska.³⁵¹ The pre-need insurance contract is usually obtained through the funeral home, with the benefit amount equal to the costs estimated for arranged services, and the funeral home acting as an agent for the insurance company.³⁵²

These pre-need financing options are deeply problematic.³⁵³ A number of state funeral home associations have managed pre-need funeral trusts that had millions of dollars in trust shortfalls.³⁵⁴ Fu-

346. MARSH, *supra* note 56, at 75.

347. *Id.*

348. *Id.*

349. Marilyn Bowden, *Pros and Cons of Funeral Trusts*, BANKRATE (Apr. 7, 2010), <https://www.bankrate.com/finance/insurance/pros-and-cons-of-funeral-trusts-1.aspx> [https://perma.cc/46M3-W9PY].

350. Lynda Neuenschwander, *The Pros and Cons of Funeral Trusts*, NAT'L CARE PLAN. COUNCIL, https://www.longtermcarelink.net/eldercare/funeral_trusts.htm [https://perma.cc/HT5M-PMG8].

351. MARSH, *supra* note 56, at 76.

352. *Id.*

353. The deficiency of pre-need funeral financing options is staggering and will be treated separately (and in great depth) in a forthcoming article. The many disadvantages of pre-need financial instruments are touted in popular media and use is discouraged. *See, e.g.*, Maranjian, *supra* note 281; Martin, *supra* note 281 (cautioning, “Funeral Directors Can Go Bankrupt or Embezzle Your Money”); Potts, *supra* note 281 (“[Y]our situation may change between when you pay and when you die.”); *Should You Prepay for Your Funeral? Safer Ways to Plan Ahead*, *supra* note 281 (“[I]f you decide to pay for your funeral in advance, be **very** cautious.” (emphasis in original)). For this reason, AARP and the Funeral Consumers Alliance recommend preplanning but discourage prepayment. Bern-Klug, *supra* note 115, at 34.

354. Victoria J. Haneman, *Tax Incentives for Green Burial*, __ NEV. L.J. __ (forthcoming 2021).

A number of state funeral home associations have established preneed trusts as a pooled income fund: almost 500 funeral homes and 10,500 investors had preneed contracts tied to the Wisconsin Funeral Director's Preneed Trust and a \$21 million shortfall occurred; in 2006, the Illinois Funeral Director's

neral trusts are so rarely used by professional planners that no information about them is included in the certification materials for financial planners, and trusts established through a funeral home should ideally have an independent third party as trustee (with an obligation to audit).³⁵⁵ Many pre-need insurance policies have a minimum age of forty to apply, benefits are not portable to a different funeral home or state,³⁵⁶ waiting periods may apply, and benefits may be impacted if the funeral home goes out of business.³⁵⁷ Further, enforcement of a pre-need contract is sometimes problematic because of underlying privity issues: courts are divided as to whether or not these contracts may be enforced after death on behalf of the executor, and survivors may therefore have no legal right to sue for breach.³⁵⁸

A significant market failure for low- and middle-income consumers engaging in pre-need prepayment and arrangement is the lack of reliable, accessible, flexible, and portable financial products that will facilitate payment through installments over time. It is well established that access to credit and financial tools is particularly meaningful for poverty reduction, and that barriers to accessing these tools disproportionately impact the poor.³⁵⁹ Low- and middle-income consumers have a need for reliable installment financing options because the likelihood that they have accumulated savings

Preneed trust ran a \$40 million shortfall; in 2011, the California Master Trust (created in 1985, with more than 27,000 investors and in excess of \$63 million under management) was sued by Attorney General Kamala Harris—who estimated that \$14 million needed to be repaid to the trust for charging excessive administrative fees and paying illegal kickbacks to funeral homes.

Id.

355. Bowden, *supra* note 349.

356. *Id.* (“Angie Grillo . . . says her experience was anything but peaceful ‘We didn’t even know she had a funeral trust until we found the account statement in her papers She lived in Florida, but the trust had been written while she lived in Wisconsin, and the trustee and beneficiary was a funeral parlor in Wisconsin.’ The Florida firm refused to accept the funeral trust for payment, and the Wisconsin funeral home refused to release funds.”).

357. *See* Martin, *supra* note 281.

358. MARSH, *supra* note 56, at 76 (“Generally, an action for breach of contract may only be brought by a party to the contract. Typically the only two parties to pre-need contract are the funeral home and the decedent. Courts are divided on the question of whether or not a pre-need funeral contract can be enforced by the executor”).

359. Shawna-Gay White, Access to Credit: A Viable Means of Poverty Alleviation (June 2, 2010) (unpublished M.A. thesis, Stanford University) (on file with author).

to cover death services expenses is lower than average, and planning for this type of inevitable expense during life has the potential to lift these consumers out of funeral poverty.

G. *Reimbursement Through Flexible Spending Accounts*

Death service expenses are not “qualified expenses” and are presently ineligible for reimbursement through an employee’s flexible spending account (“FSA”).³⁶⁰ The FSA is a plan authorized under section 125 of the Internal Revenue Code wherein an employee may deposit a set monthly amount into the plan on a pre-tax basis, and qualified expenses may be netted against the pre-tax contributions and reimbursed through the FSA.³⁶¹ The intent of the plan is that the employee’s after-tax cost for expenses reimbursed through the FSA is limited.³⁶² Generally, qualified expenses for the purpose of FSA reimbursement are those eligible for a medical or dental itemized deduction under section 213(d) of the Code.³⁶³ At time of death, heirs are not entitled to claim funds remaining in the FSA account.³⁶⁴

Some or all death care expenses should be characterized as “qualified expenses” for the limited purpose of reimbursement through FSA accounts.³⁶⁵ Reimbursement would be permitted both for pre-need and at-need expenses. Allowing death care expenses

360. See *Funeral Expenses: FSA Eligibility*, FSA STORE, <https://fsastore.com/FSA-Eligibility-List/F/Funeral-Expenses-E325.aspx> [<https://perma.cc/66XF-VCLK>].

361. *FAQs for Government Entities Regarding Cafeteria Plans*, IRS, <https://www.irs.gov/government-entities/federal-state-local-governments/faqs-for-government-entities-regarding-cafeteria-plans> [<https://perma.cc/T4Q3-P8CH>] (last updated Mar. 16, 2020).

362. Uwe E. Reinhardt, *The Trouble with (In)flexible Spending Accounts*, N.Y. TIMES (May 29, 2009, 7:14 AM), <https://economix.blogs.nytimes.com/2009/05/29/the-trouble-with-flexible-spending-accounts/> [<https://perma.cc/DRY4-QD6S>] (contrasting the intent of the provision with its *actual* impact, criticizing “[t]he F.S.A. comes from a mischievous portion of Section 125 of the Internal Revenue Code that seems designed to be (1) inequitable, (2) administratively cumbersome, (3) inflationary and (4) vexatious to millions of Americans.”).

363. Laura Taylor, Adam Cohen & Vanessa Scott, *Emerging Coronavirus Issues for Employer Benefit Plans*, LAW360 (Mar. 13, 2020, 4:23 PM), <https://www.law360.com/articles/1252974/emer-ging-coronavirus-issues-for-employer-benefit-plans> [<https://perma.cc/9Q6D-EGWR>].

364. Any medical expenses for the decedent that arose before time of death may be reimbursed through the plan. Sarah Li Cain, *Asked and Answered: What Happens to an FSA When Someone Dies?*, FSA STORE, <https://fsastore.com/learn/basics/fsa-when-someone-dies> [<https://perma.cc/25AG-A5G7>].

365. It is outside of the scope of this Article to discuss whether death care services should be qualified for purposes of section 213(d). The author reserves the right to address this issue at a later time.

to be FSA-eligible on a pre-need basis would incentivize pre-need planning because some portion of the planning would come from pre-tax contributions through the use of an FSA. Permitting reimbursements for at-need expenses (arising after death) would also permit contributions made by the decedent during life to be used for at-need planning by survivors, thereby alleviating some of the financial burden on the living through the use of decedent's own contributions.³⁶⁶

CONCLUSION

The idea of poverty is intuitive and ubiquitous, extending far beyond the notion of having limited or insufficient financial resources.³⁶⁷ Lifting oneself out of poverty is extraordinarily difficult and not simply a matter of working harder: being stuck above or below the poverty line carries the implicit consequences of financial fragility and limited opportunity, both of which have the potential to create cycles of poverty that have intergenerational impact within a family.

Death service expenses represent more than simply another unexpected bill to be paid. There is a societal and cultural baggage to unpack with this unique expense, and spending is often about more than money. Consumption within this space may operate not only as a status marker,³⁶⁸ but also as a means of satisfying community expectations and avoiding peer judgment that the deceased has been dishonored. Driven by guilt of loss, peer pressure, and cul-

366. The main drawback to an FSA is the "use it or lose it" rule imposed on the employee, with unused contributions usually being forfeited by the employee and turned over to the employer. See *What Can Employers Do with Forfeited Employee FSA Balances?*, FILLER & ASSOCS. (Jan. 27, 2017), <http://www.filler.com/2017/01/27/what-can-employers-do-with-forfeited-employee-fsa-balances/> [<https://perma.cc/2WLR-8MGB>].

367. Oscar Calvo-González, *It Takes More Than Just Money to Escape Poverty*, WORLD BANK BLOGS (Oct. 17, 2018), <https://blogs.worldbank.org/latinamerica/it-takes-more-just-money-escape-poverty> [<https://perma.cc/95P6-85UC>]. ("The other day I asked my five-year-old daughter if she knew what being poor was. She hesitated at first but soon she was on a roll. She mentioned that being poor was not having enough to eat, not living in a 'germ-free' house, and—my favorites—not having gummy bears or a blanket. All this within the first couple of minutes of possibly her first time ever thinking about what being poor meant.")

368. See generally CURRID-HALKETT, *supra* note 174.

tural choices, extraordinary levels of consumption relative to overall wealth occur, with potentially staggering consequences to the most financially vulnerable in our society.³⁶⁹

Changes must be made that heighten consumer death literacy, bring awareness to spending during times of grief, and ease access to information. The merits of pre-need prepayment death care planning should be extolled and incentivized, so that the consumer is not rendered vulnerable by the need to make swift decisions while likely cognitively impaired. It is also time to question whether fusty death services laws operate primarily to protect the consumer (in which case, updates are needed) or to further entrench current funerary practice and create market barriers that stymie disruptive (and potentially less expensive) technologies.

369. See David McNeill, *The Business of Death: Profiting from Loss in Japan*, IRISH TIMES (Aug. 31, 2017, 6:00 AM), <https://www.irishtimes.com/business/innovation/the-business-of-death-profiting-from-loss-in-japan-1.3198203> [<https://perma.cc/2JVD-GAKT>] (“Funeral homes typically take advantage of a cultural unwillingness to haggle during a period of mourning. Customers are sometimes not even offered quotes for funeral services before beginning the burial process. Confronted with the exorbitant final tab, many wince, swallow hard and stump up the cash.”).